

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

JOHN DEREK MURPHY
Petitioner

vs.

Case No.05-10548-JLT

Michael A Thompson,
MCI Shirley, Superintendent
Respondent

MEMORANDUM OF LAW IN SUPPORT OF
PETITION UNDER 28 U.S.C. §2254
FOR WRIT OF HABEAS CORPUS BY JOHN DEREK MURPHY,
A PERSON IN MASSACHUSETTS STATE CUSTODY

The Petitioner John Derek Murphy, W68679, (hereinafter "Murphy") is currently confined at the Massachusetts Correctional Institute at Shirley, Massachusetts ("MCI Shirley-Medium"). His indictment and conviction arose in Middlesex County, Massachusetts. He was sentenced to nine to ten years by a Massachusetts Superior Court judge on October 19, 2000. Petitioner Murphy, through counsel, respectfully files this memorandum in support of his petition pursuant to 28 U.S.C. § 2254 requesting the issuance of a writ of habeas corpus.

I. INTRODUCTION

A defendant's right to a fair trial by an impartial jury is the foundation of the American system of justice. Petitioner Murphy's 6th Amendment constitutional right to a fair trial was destroyed when the state court refused to declare a mistrial and

dismiss a juror who had an inappropriate and highly prejudicial conversation with another person about Murphy's other similar criminal case during the trial and prior to deliberations. The fair trial was compromised because the juror withheld the highly relevant information that this other person was both one of his best friends and Murphy's other criminal defense attorney. Murphy submits that this failure to be forthright when questioned by the trial court made the court's subsequent finding of impartiality meaningless. If the juror had truly remained fair and impartial after this conversation he would have fully disclosed who the "other person" was to the court. Because the juror effectively lied to the trial court, Murphy did not receive a fair trial as was his right under the United States Constitution. Under no standard can this be held harmless.

II. STATEMENT OF THE CASE

On April 23, 1998 the Petitioner John Derek Murphy was charged, in eighteen indictments out of the Middlesex Superior Court, with fourteen counts of larceny over \$250 in violation of G.L. c. 266, §30; with one count of fraudulent use of a credit card to obtain money and goods in violation of G.L. c. 266, §37C; with one count of forgery of a record/return or writing in violation of G.L. c. 267, §1; with one count of forgery by uttering a false record/deed or writing in violation of G.L. c. 267, §5; and with one count of falsifying or stealing a driver's

license in violation of G.L. c. 90, §24B. (See Docket Sheet attached). In December, 1999 two counts (6 and 13) of larceny over \$250 were dismissed at the request of the Commonwealth. (See Docket).

On October 10, 11, 12, 13, 16, 17, and 18, 2000, the remaining sixteen indictments were tried to a jury in the Middlesex Superior Court (Hamlin, J., presiding). The jury returned verdicts of guilty on all sixteen counts. (Transcript Volume VII, pgs.134-144). The court sentenced Murphy to nine to ten years on the forgery indictments (counts 16 and 17); and four and half to five years on the larceny counts to run concurrent with the forgery sentence. (See Transcript Volume VIII). The license falsification charge, count 18 was filed by the court. (See Transcript Volume VIII).

Murphy filed a Notice Of Appeal on October 19, 2000. The case was entered in this Court on May 1, 2001 and an oral argument was held on October 17, 2002. On October 15, 2003 the Appeals Court released an opinion affirming the judgment against Murphy at Commonwealth v. Murphy, 59 Mass.App.Ct. 571 (October 15, 2003). (See Decision attached). On November 18, 2003 the Petitioner sought review of his conviction in the Massachusetts Supreme Judicial Court in an Application for Further Appellate Review (Docket No. FAR-13790). On December 29, 2003, the S.J.C. denied the Application for Further Appellate Review. (See

attached).

Murphy now seeks relief from this Court with his Petition.

III. STATEMENT OF FACTS

The Appeals Court adopted essentially the same facts as set forth by Murphy in his brief and application for further appellate review.¹ The facts set forth below are based on both the Appeals Court decision and transcript evidence from Transcript Volume I, page 103; Transcript Volume V, pages 1-13; Transcript Volume VI, pages 73-75 and 88-111; and Transcript Volume VII, pages 3-10, all attached to this Memorandum.

During jury selection process, one of the jurors indicated that his father-in-law was a former United States Attorney, and that his cousin was a police officer. On the fifth day of trial, this same juror informed the court that, while the trial was ongoing, he spoke with an individual at a social gathering and learned that the defendant had other criminal matters pending in Suffolk Superior Court. 59 Mass.App.Ct. at 579; see also Transcript Volume I, pg. 103; Transcript Volume V, pgs. 4-13. At a hearing on the matter, the juror informed the judge that "somebody let out that they knew that the defendant had another criminal proceeding before the court." (Emphasis added). The juror said that he had not spoken to any of the other jurors about the matter, and assured the judge that he could remain fair

and impartial. 59 Mass.App.Ct. at 579; Tr.Vol.V:4-13. When asked by the trial court to relate the exact conversation, the juror said that "this person", after finding out that the juror was before Judge Hamlin, said "Oh that's the John Murphy case. He's got another one too."² (Transcript Volume V, pgs.5-7). When asked by the trial court what that meant, the juror responded:

Right. So I don't know what that really means. But I assumed it meant that he had another -- I think it was reasonable to infer that he meant another -- I happen to know a lot of law enforcement people, unfortunately, and I think it was just reasonable to assume that he meant another -- maybe he said, 'he's got another case too.' I'm trying to remember the exact words.

(Transcript Volume V, pgs.5-7)

When asked again what that meant, the juror said:

Well, I thought it meant that he had another case, another court case too.

(Transcript Volume V, pgs. 5-7).

The juror said there was no further conversation and insisted that he could remain impartial and fair stating:

Absolutely. I think it is completely irrelevant to this matter at hand. And in this country, you're innocent until proven guilty. And it is completely irrelevant as far as I'm concerned. And I only mentioned it because I thought the defendant was entitled to have, you know, the best, fairest hearing possible, which is why I wanted to bring it up to everybody's attention. It has no impact on me whatsoever.³

(Transcript Volume V, pg. 8).

¹ The Appeals Court decision footnoted this part of the conversation between the juror and the trial court. 59 Mass.App. at 579, Note 9.

² The Appeals Court decision also footnoted this response from the juror. See: 59 Mass.App.Ct. at 579, Note 10.

While insisting that he could remain fair and impartial, the juror failed to disclose his close relationship with the other attorney, referring to his best friend merely as "somebody". (Tr.Vol.V:5-7). The Defendant completely relied upon these incomplete representations in deciding not to move to dismiss the juror or for a mistrial at that time. (Transcript Volume V, pgs.10-13). The record makes clear that the reason Murphy's trial counsel did not move for a mistrial earlier was based upon her belief that the juror did not say "other criminal matters" in his testimony. (Transcript Volume VII, pg.9). "The judge found the juror to be credible when he said that he had not talked to any of the other jurors about the matter, found that the juror remained fair and impartial, and permitted him to remain on the jury." 59 Mass. App. Ct. at 579.

After calling Robert Fox ("Attorney Fox"), Murphy's trial counsel in the other case, that same evening, the following day Murphy informed his trial counsel who then informed the court that the person with whom the juror had spoken was Murphy's Suffolk County trial counsel. Transcript Volume VI, pgs.73-75,88-102,105-111; 59 Mass. App. Ct. at 579. After being sworn, Murphy testified that he called Attorney Fox the previous evening, and that during the conversation Attorney Fox inquired as to whether a juror had been excused. (Tr.Vol.VI:97-101,105-110). Murphy stated that Attorney Fox told Murphy that he "ran across a juror"

and that he told the juror he was Murphy's criminal attorney on Suffolk Superior Court matters. (Transcript Volume VI, pgs. 107-108; 59 Mass. App. Ct. at 579.)

The trial court ordered Attorney Fox to appear in court and then conducted a further hearing. 59 Mass. App. Ct. at 579. In response to the judge's questions, Fox indicated that the juror was one of his best friends and that he had seen him at synagogue that past weekend. Transcript Volume VII, pg. 3; 59 Mass. App. Ct. at 579. "Fox further advised the judge that prior to this trial, he and the juror had had many discussions about his criminal defense work and the judicial system." 59 Mass. App. Ct. at 579-580. For some inexplicable reason, Fox revealed that he represented Murphy on other criminal matters in the Suffolk Superior Court after the juror told him that he was on a jury before Judge Hamlin. Transcript Volume VII, pg.4; 59 Mass. App. Ct. at 580. On this particular point Fox denied telling Murphy that he told the juror he was Murphy's attorney on similar criminal matters in Suffolk Superior Court, stating that " I don't think I was that direct", however the juror was clear that Fox told him he represented Murphy on other criminal matters. (Tr.Vol.V:3-11; Tr.Vol.VII:6). Fox did admit that his friend knew he was a criminal defense lawyer and that they had "had many discussions about [his] work and the judicial system". Transcript Volume VII, pgs 5-6; 59 Mass. App. Ct. at 580.

Upon receiving this information, Murphy's trial counsel moved for a mistrial and objected to the juror's continued participation in the trial. Transcript Volume VII, pgs. 8-10; 59 Mass. App. Ct. at 580. Because several other jurors had already been let go for other reasons, had this juror been dismissed the judge would have been forced to declare a mistrial because there would have only been eleven jurors remaining. See Docket; Transcript Volume III, pgs. 5-6; Transcript Volume V, pgs. 3-11; Transcript Volume VII, pgs. 8-10). The trial judge made further findings as to the credibility of Fox and the juror, renewed her finding that the juror remained impartial and unbiased, denied the motion for a mistrial, and permitted the juror to remain. Transcript Volume VII, pgs. 8-10; 59 Mass. App. Ct. at 580.

IV: ARGUMENT

JOHN DEREK MURPHY'S CONVICTIONS AND SENTENCES ARE CONSTITUTIONALLY INFIRM BECAUSE THEY ARE THE PRODUCT OF SIXTH AND FOURTEENTH AMENDMENT VIOLATIONS OF MURPHY'S DUE PROCESS RIGHTS AS WELL AS HIS RIGHTS TO A FAIR TRIAL BY AN IMPARTIAL JURY.

The Standard

The Antiterrorism and Effective Death Penalty Act's (AEDPA) deferential standard as codified in 28 U.S.C. § 2254 (d)(1)-(2) provides:

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim--

(1) resulted in a decision that was contrary to, or

involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d).

The issue regarding the juror misconduct was appropriately raised in Murphy's direct appeal and considered by the Appeals Court in Commonwealth v. Murphy, 59 Mass. App. Ct. 571, 579-581 (2003). See Manisy v. Maloney, 283 F. Supp. 2d 307, 319-320 (D.Mass,2003).

Although the Massachusetts Appeals Court recognized the Supreme Court's ruling that any private communication or contact either directly or indirectly with a juror during a trial about the matter pending before the jury is deemed presumptively prejudicial, the court did not find the trial court's actions to be clearly erroneous or an abuse of discretion. Commonwealth v. Murphy, 59 Mass. App. Ct. 571, 580-581 (2003), quoting Remmer v. United States, 347 U.S. 227, 229 (1954). The court's basis was that "even though the contact may have given rise to a high probability of prejudice, the trial judge's appropriate hearing, coupled with her detailed findings, satisfies us that, as the trial judge found, this probability did not manifest in any actual prejudice".

Commonwealth v. Murphy, 59 Mass. App. Ct. at 581. The Petitioner Murphy submits that under 28 U.S.C. § 2254, this decision is either "an unreasonable determination of the facts in light of the evidence" in violation of clearly established United States Supreme

Court precedent or (2) "contrary to" clearly established federal law.

A. Given The Specific Facts Of This Case, The State Court's Finding That There Was No Actual Prejudice Was An Unreasonable Determination Of the Facts In Violation Of The Supreme Court Principles Set Forth In Mattox v. United States and Remmer v. United States.

Under clearly established constitutional law, the Sixth Amendment to the United States Constitution, as applied to the States through the Due Process Clause of the Fourteenth Amendment, guarantee to the criminally accused the right to a fair trial by an impartial jury with indifferent jurors. Irvin v. Dowd, 366 U.S. 717, 722 (1961); Jones v. Robbins, 8 Gray 329, 341-342 (1857); Duncan v. Louisiana, 391 U.S. 145, 149 (1968). In Mattox v. United States, 146 U.S. 140, 142 (1892) and later in Remmer v. United States, 347 U.S. 227, 228-229 (1954), the Supreme Court declared the principle that private communications with jurors and third persons are forbidden and deemed presumptively prejudicial unless there is a showing that the contact was harmless. Indeed "[o]ur system of trial by jury presupposes that the jurors be accorded a virtual vacuum wherein they are exposed only to those matters which the presiding judge deems proper for their consideration. This protection and safeguard must remain inviolate if trial by jury is to remain a viable aspect of our system of jurisprudence. Any conduct which gives rise to an appearance of evil must be scrupulously avoided." Caliendo v. Warden of California Men's

Colony, 365 F.3d 691, 696 (9th Cir. 2004), cert. denied Marshall v. Caliendo, 2004 U.S. LEXIS 6733 (U.S., Oct. 12, 2004), quoting United States v. Harry Barfield Co., 359 F.2d 120, 124 (5th Cir. 1966).

The First Circuit has noted that juror misconduct, either through juror bias or improper juror contacts "are at the core of the Sixth Amendment's right to a trial by an impartial jury, free from prejudicial contact. Private communications with a deliberating juror create the concern that the juror may reach a verdict on the basis of the matters communicated, rather than the trial evidence." United States v. Gaston-Brito, 64 F.3d 11, 12 (1995), quoting United States v. Day, 830 F.2d 1099, 1103 (10th Cir. 1987). See also United States v. O'Brien, 972 F.2d 12, 13-15 (1st Cir.1992) (Applying the Remmer/Mattox standard of review); United States v. Angiulo, 897 F.2d 1169, 1184 (1st Cir. 1990).

In this case, although the trial judge conducted a hearing, given the particular actions of the juror in this case and his lies by omission about his true relationship with Murphy's other criminal defense attorney, the trial judge's inquiry was not enough and the Appeals Court's affirmation of what happened was in clear contravention of U.S. Supreme Court precedent.

When a juror lies or gives answers intended to obscure the court's inquiry as happened in Murphy's case, the juror demonstrates presents unacceptable risk of partiality and

unfairness. For example, the Second Circuit has held that an impermissible partiality is reflected when a juror intentionally lies or deliberately fails to disclose information. United States v. Colombo, 869 F.2d 149, 151-152 (2nd Cir.1989). In Colombo, the court found that a juror both claimed to know the defendant's location was a "hang out for gangsters" and responded falsely to a material question on voir dire because she wanted to sit on the jury. Id at 152. Similar to the case at bar, it was not the fact that "the juror's relationship with her brother-in-law [a government attorney] tainted the proceedings but that *her willingness to lie about it exhibited an interest strongly suggestion partiality*". Id at 152, emphasis added. In this case, the juror's friendship with Murphy's other defense attorney would have likely been irrelevant had there not been a conversation about Murphy's other similar criminal case and had the juror not blatantly omitted the fact of his friendship during questioning by the trial judge. While the juror behaved appropriately in bringing the fact of the conversation to the court, there is no innocent or logical explanation for his failure to be upfront about his close friendship with the other attorney. Indeed if Murphy had not called Attorney Fox after the hearing with the juror, he could never have know that his own attorney revealed prejudicial information to a juror. Nor would he have known that the juror was "best friends" with the attorney. Contrast United States v. Greer, 285 F.3d 158,

167 (2nd Cir.2000) (Court found juror's omissions or misstatements were not made for an illegitimate purpose or with a malicious design but were inadvertent or based upon the belief that he could be impartial). Based upon the testimony of Attorney Fox, it is clear that the juror was well aware of the significance of the conversation and his close ties to Attorney Fox. To say otherwise is to avoid the reality of the situation. Murphy submits that the juror wanted to stay on the jury and he was willing to obstruct the court's inquiry by deliberately omitting the fact of his close friendship and many conversations with Attorney Fox to avoid getting challenged. The trial judge ignored this very serious issue after Attorney Fox's testimony and declined to question the juror further or declare a mistrial. While it may be inappropriate to speculate into the jury deliberations, it is unlikely that the juror remained silent during deliberations about either his conversation with Attorney Fox or his knowledge about Murphy's other similar criminal case in Suffolk County. Daughtry v. Dennehy, 946 F.Supp 1053, 1065 (D.Mass 1996), citing Mahoney v. Vondergritt, 938 F.2d 1490, 1492 (1st Cir. 1991), cert. denied, 502 U.S. 1104, 117 L. Ed. 2d 436, 112 S. Ct. 1195 (1992).

The Colombo court's concern was that "[s]uch an interest not only suggests a view on the merits and/or knowledge of evidentiary facts but is also quite inconsistent with an expectation that a prospective juror will give truthful answers concerning her or his

ability to weigh the evidence fairly and obey the instructions of the court". Id at 151-152. In noting the many other courts in accord with this view [see e.g.: United States v. Bynum, 634 F.2d 768, 771 (4th Cir.1980) ("certainly when possible non-objectivity is secreted and compounded by the deliberate untruthfulness of a potential juror's answer on voir dire, the result is deprivation of the defendant's rights to a fair trial"); McCoy v. Goldston, 652 F.2d 654, 658-659 (6th Cir. 1981)(district court shall presume bias where juror deliberately concealed information); United States v. Perkins, 748 F.2d 1519, 1531-33 (11th Cir.1984)(a juror's refusal to disclose that he knew the defendant gives rise to a presumption of actual bias)], the Colombo court correctly focused on the issue of the juror's "deliberateness" in failing to disclose information. Id.

The juror's deliberate failure to fully disclose his relationship with Murphy's other criminal defense attorney is exactly what is at issue in this case. He was asked specific questions about his conversation with the person he referred to as "somebody". He was given the opportunity to disclose that his conversation was with one of his closest friends. The transcript makes clear that he deliberately chose to omit the truth. Transcript Volume V, pgs. 1-14. Certainly the information was ultimately revealed once the other attorney testified, but it is the juror's motives for concealing information that this Court must

look at in determining whether the state court erred in affirming Murphy's conviction under these circumstances. See Jones v. Cooper, 311 F.3d 306, 313 (4th Cir.2002), citing to McDonough Power Equip., Inc. V. Greenwood, 464 U.S. 548, 556 (1984).

However, regardless of the juror's motivation to lie by omission in response to legitimate questions posed by the state trial court, the more serious concern for Murphy is "[i]f a juror treats with contempt the court's admonition to answer . . . questions truthfully, [he] can be expected to treat [his] responsibilities as a juror - to listen to the evidence, not to consider extrinsic facts, to follow the judge's instructions - with equal scorn. Moreover, a juror who tells major lies creates a serious conundrum for the fact-finding process. How can someone who [himself] does not comply with the duty to tell the truth stand in judgment of other people's veracity?" Dyer v. Calderon, 151 F.3d 970,983 (9th Cir.1998). In Dyer the court inferred bias on the part of a juror who lied repeatedly about her background in order to secure a seat on the jury even though the court could find no "actual bias" because the juror's actions created "destructive uncertainties" about her indifference. Id at 982-983. There can be no doubt that Murphy would have reacted differently to the juror's disclosures had the juror immediately stated that the conversation was with Murphy's other defense attorney. This is born out by the fact that he immediately notified his trial counsel the next

morning about his conversation with Attorney Fox.

In Green v. White the Ninth Circuit again found that a state court's determination that a juror did not lie was in contradiction to the facts and was therefore clearly erroneous. 232 F.3d 671, 677-678 (9th Cir.2000). Given evidence that a juror lied twice to secure a seat on the jury and engaged in behavior during the trial that brought "his impartiality into serious question", the Ninth Circuit found the state court's treatment regarding the issue of the juror's lies "particularly disturbing". Id at 678, Note 9. In this case it is clear that had Murphy not had a conversation with Attorney Fox the night after the juror testified, the fact of the friendship would never have come to light. Thus, the trial judge's refusal to look further into the juror's motivations for lying and the Appeals Court's affirmation of what occurred is even more disturbing.

The trial judge was not entitled to simply rely on the juror's assurances that they could remain impartial. See Murphy v. Florida, 421 U.S. 794, 800 (1975); Sheppard v. Maxwell, 384 U.S. 333, 351 (1966). "A juror is unlikely readily to admit to a judge that he has violated the express directive of the Court against discussing the case. Indeed, even a juror's good faith belief in his own impartiality is not dispositive." United States v. Shapiro, 669 F.2d 593, 601 (9th Cir.1982), citing Irvin v. Dowd, 366 U.S. at 727-28. As stated in United States v. Gaston-Brito, "it was the .

. . court's obligation to develop the relevant facts on the record, not merely presume them." 64 F.3d 11, 13 (1st Cir.1995); accord Dyer v. Calderon, 151 F.3d at 976 ("a judge investigating juror bias must find facts, not make assumptions"). Once the issue was raised by Attorney Fox in his testimony, the trial judge should have conducted a further inquiry with the juror to determine why he omitted the fact of the close friendship. The fact that the judge did not do so and the affirmation of this by the Appeals Court was in direct contravention with established federal constitutional precedent in light of the facts of this case and the evidence presented.

B. The State Court Decision Was Contrary to United States Supreme Court Precedent Requiring That the Government Bear The Burden Of Proving The Juror Misconduct To Be Harmless In This Case.

The record establishes and the Appeals Court even agreed that the contact between the juror and Attorney Fox gave "rise to a high probability of prejudice", although the court erroneously determined that the trial court's hearing and findings "satisfied" the court that "this probability did not manifest in any actual prejudice". Commonwealth v. Murphy, 59 Mass. App. Ct. at 581. The Appeals Court's application and analysis of the constitutional issues raised by the juror misconduct was contrary to established federal precedent.

Referred to as the Mattox rule by the Ninth Circuit, when an "unauthorized communication with a juror crosses a low threshold to

create the potential for prejudice" or the "risk of influencing the verdict", prejudice is "presumed under these circumstances, and the defendant's motion for a new trial must be granted unless the prosecution can show that there is no reasonable possibility that the communication will influence the verdict." Caliendo v. Warden of California Men's Colony, 365 F.3d at 697, citing United States v. O'Brien, 972 F.2d at 14; United States v. Dutkel, 192 F.3d 893, 899 (9th Cir.1999). Therefore in the instant case, once the juror came forward and informed the trial judge about his conversation with Attorney Fox, the burden shifted to the Commonwealth to show that there was no reasonable possibility of harm to the defendant. Remmer, 347 U.S. at 229; United States v. O'Brien, 972 F.2d at 14. Murphy submits that after the hearing with the juror and once further information came to light regarding the juror's close relationship with Attorney Fox, the presumption of prejudice increased and the Commonwealth should have been required to show that the juror's lies by omission did not harm Murphy and influence the verdict.

The Commonwealth did not satisfy that burden nor did the trial judge or Appeals Court recognize that the Commonwealth bore that burden. Indeed, the language of the Appeals Court decision suggests that the burden remained solely on Murphy stating that "[a] finding that a juror is impartial will not be overturned on appeal unless the defendant makes a clear showing of abuse of discretion or that

the finding was clearly erroneous". Commonwealth v. Murphy, 59 Mass. App. Ct. at 581, quoting Commonwealth v. Emerson, 430 Mass. 378, 384 (1999), cert. denied, 529 U.S. 1030 (2000).

A defendant is prejudiced when he is convicted by a jury with even one biased member. United States v. Olano, 507 U.S. 725, 739 (1993). In United States v. Cheek, the Fourth Circuit enumerated the factors the Supreme Court laid out for establishing a presumption of prejudice: "(1) any private communication; (2) any private contact; (3) any tampering; (4) directly or indirectly with a juror during trial; (5) about the matter before the jury." 94 F.3d 136, 141 (1996) (citing Remmer, 347 U.S. at 229. While there are no allegations of jury tampering in this case, Murphy has shown all the other factors that trigger a presumption of prejudice, see Cheek, 94 F.3d 136, 141 (4th Cir. 1996). Especially where the juror deliberately obstructed the court's inquiry by intentionally omitting information regarding the true nature of the extraneous influence that he knew to be relevant, the circumstances dictate that bias must be presumed. Dyer v. Calderon, 151 F.3d at 981, 984 ("Implied bias may indeed be the single oldest rule in the history of judicial review. . . . a rule so deeply embedded in the fabric of due process that everyone takes it for granted."); contrast Amirault v. Fair, 968 F.2d 1404, 1405-06 (1st Cir.1992) (bias not presumed where juror stated she had not been victim of sexual assault because juror had blocked out forty year old memory of childhood rape); see

McDonough Power Equip., Inc. V. Greenwood, 464 U.S. at 556 (where juror dishonestly answers voir dire question, court must inquire as to bias).

Once prejudice was presumed, the burden lay "heavily" upon the government to prove that the error was harmless to the defendant. Remmer v. United States, 347 U.S. 229. The Commonwealth simply did not carry that burden. Once Attorney Fox testified that the juror was one of his best friends, and someone with whom he had had many conversations about the criminal justice system, it behooved the Commonwealth to rebut the further presumption of prejudice raised by the juror's lies by omission. The Commonwealth did not seek any further inquiry of the juror regarding his omission or reason to omit the fact of the friendship. Indeed neither the Commonwealth or the trial judge appeared at all disturbed by the juror's behavior, even after Murphy strongly requested that the juror be dismissed because of the clear prejudice to Murphy at that point. Nor was the hearing conducted by the trial judge sufficient to rebut the presumption of prejudice in this case.

In United States v. Shapiro, the court ruled that the government had not rebutted the presumption of prejudice even though the jurors affirmed their impartiality and the trial judge had concluded that juror discussion of a bribery attempt was "fleeting" and "general". Shapiro, 669 F.2d at 600-01. In United States v. Cheek the court explained that "[t]o implement the heavy obligation

of the party who seeks to rebut the presumption of prejudice, . . . the proof must establish that there is no reasonable possibility that the verdict was affected by the contact." 94 F.3d at 142. Given the juror's dishonesty when questioned about his conversation with Attorney Fox, there is at least a reasonable possibility that he was tainted by what he learned from his close friend about Murphy. In addition there was the very serious fact that the juror was not honest with the judge about the nature of his friendship with Attorney Fox, a fact which raises serious doubts about the juror's potential bias and ability to be fair in deliberations. The Commonwealth failed to rebut this presumption.

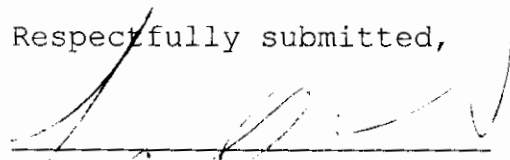
The Appeals Court held Murphy to a burden of proving 'actual prejudice' and the Supreme Judicial Court upheld this erroneous standard by denying Murphy's Application for Further Appellate Review. Commonwealth v. Murphy, 59 Mass. App. Ct. at 581. This contravenes clearly established Supreme Court precedent that requires the *Commonwealth* to prove harmlessness beyond a reasonable doubt. The Appeals Court's failure to apply this constitutionally required standard of review is an "unreasonable application of clearly established Federal law, as determined by the Supreme Court of the United States". 28 U.S.C. § 2254 (d) (1). The Sixth Circuit has granted a habeas petition on precisely this issue; the state court's failure to apply a constitutionally required standard for evaluating prejudice in a jury-taint case was an

unreasonable application of clearly established Federal law. See Nevers v. Killinger, 169 F.3d 352, 370-73 (6th Cir.1999). This Court should do the same.

V. CONCLUSION

For the reasons stated above, the Petitioner John Derek Murphy respectfully requests that this Court grant his request for review pursuant to 28 U.S.C. § 2254(d).

Respectfully submitted,


Angela G. Lehman

BBO 567411

18 Tremont Street, Suite 902

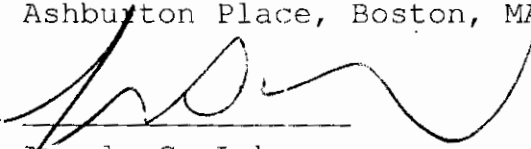
Boston, MA 02108

617-399-6720

Date: June 23, 2005

CERTIFICATE OF SERVICE

I, Angela G. Lehman, do hereby certify that I have mailed a copy of the within Memorandum to AAG Maura McLaughlin, Criminal Bureau, One Ashburton Place, Boston, MA 02108 on June 23, 2005.


Angela G. Lehman

02:42 PM

Commonwealth of Massachusetts

11/27/2000

MIDDLESEX SUPERIOR COURT

Case Summary

Criminal Docket

MICR1998-00613

Commonwealth v Murphy, John D.

File Date	04/23/1998	Status	dsenimp	Disposed (sentence imposed)
Status Date	10/19/2000	Session	7	Indictment
Return Date	4/29/1998	Origin	I	Crim 7 (6A Cambridge)
Lead Case		Jury Trial	y	Public View Yes

Trial Deadline	04/29/1999	Deadline Status	Deadline active since retu	Status Date	02/16/2000
Custody Status		Dangerous Weapon		Illegal Substance	
Prior Record	Unknown	Social Risk	Unknown		
Arraignment	04/29/1998	PTC Deadline	07/28/1998	Pro Se Defendant	

OFFENSES

Num	Offense	Code	Status	Status Date
1	01/31/1997	266:030:1.21	Guilty verdict	10/18/2000
	Larceny, over \$250			
2	02/02/1997	266:030:1.21	Guilty verdict	10/18/2000
	Larceny, over \$250			
3	02/03/1997	266:030:1.21	Guilty verdict	10/18/2000
	Larceny, over \$250			
4	02/07/1997	266:030:1.21	Guilty verdict	10/18/2000
	Larceny, over \$250			
5	03/10/1997	266:030:1.21	Guilty verdict	10/18/2000
	Larceny, over \$250			
6	04/08/1997	266:030:1.21	Dismissed	12/20/1999
	Larceny, over \$250			
7	06/07/1997	266:030:1.21	Guilty verdict	10/18/2000
	Larceny, over \$250			
8	06/07/1997	266:030:1.21	Guilty verdict	10/18/2000
	Larceny, over \$250			
9	06/09/1997	266:030:1.21	Guilty verdict	10/18/2000
	Larceny, over \$250			
10	06/10/1997	266:030:1.21	Guilty verdict	10/18/2000
	Larceny, over \$250			
11	06/10/1997	266:030:1.21	Guilty verdict	10/18/2000
	Larceny, over \$250			
12	06/19/1997	266:030:1.21	Guilty verdict	10/18/2000
	Larceny, over \$250			
13	06/24/1997	266:030:1.21	Dismissed	12/20/1999
	Larceny, over \$250			
14	07/03/1997	266:030:1.21	Guilty verdict	10/18/2000
	Larceny, over \$250			
15	01/01/1997	266:037C	Guilty verdict	10/18/2000
	Credit card, fraudulent use to obtain money/goods			
16	06/13/1997	267:001	Guilty verdict	10/18/2000
	Forgery, record/return/writing			

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Commonwealth of Massachusetts
MIDDLESEX SUPERIOR COURT
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Commonwealth v Murphy, John D.

Num	Offense	Code	Status	Status Date
17	06/13/1997	267:005	Guilty verdict	10/18/2000
	Forgery, utter false record/deed/writing			
18	06/13/1997	090:024B	Guilty verdict	10/18/2000
	Falsify/steal permit/license/registration/inspection			

PARTIES

Defendant
John D. Murphy
Active 04/23/1998

Private Counsel 547598
Aviva E Jeruchim
Gordon & Wise
101 Federal Street
17th floor
Boston, MA 02110-1844
Phone: 617-261-0100
Fax: 617-261-0789
Withdrawn 11/01/2000

Private Counsel 567411
Angela G Lehman
Cosgrove Eisenberg & Kiley
22 High Street
Suite 4
Medford, MA 02155
Phone: 781-396-8740
Fax: 617-330-8774
Active 11/01/2000 Notify

Plaintiff
Commonwealth
Active 04/23/1998

District Atty's Office 301035
David P Linsky
Witmer Karp Warner & Thoutte
28 State Street
Boston, MA 02109
Phone: 617-248-0550
Fax: 617-722-2239
Withdrawn 05/05/1999

District Atty's Office 561536
Lincoln S Jalelian
Middlesex County District Atty's Office
40 Thorndike Street
East Cambridge, MA 02141
Phone: 617-679-6500
Fax: 617-225-0871
Active 05/05/1999 Notify

ENTRIES

Date	Paper	Text
04/23/1998	1.0	Indictment returned
04/23/1998	2.0	Writ of Habeas Corpus issued to Southeastern Correctional Center (Bridgewater) for 4/29/98
04/29/1998	3.0	Affidavit of indigency filed; approved (Charles M Grabau, Justice)Intake Prepared By PO Paterna Court Appoints Scheduled Bar

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MIDDLESEX SUPERIOR COURT

Case Summary

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MICR1998-00613

Commonwealth v Murphy, John D.

Date	Paper	Text
	3.0	Advocate Aviva Jeruchim, Esq
04/29/1998	4.0	Appointment of Counsel Jeruchim
04/29/1998		Appearance of Commonwealth's Atty: Linsky
04/29/1998		Deft arraigned before Court(Charles M Grabau, Justice)
04/29/1998		RE offense 1: Plea of not guilty
04/29/1998		RE offense 2: Plea of not guilty
04/29/1998		RE offense 3: Plea of not guilty
04/29/1998		RE offense 4: Plea of not guilty
04/29/1998		RE offense 5: Plea of not guilty
04/29/1998		RE offense 6: Plea of not guilty
04/29/1998		RE offense 7: Plea of not guilty
04/29/1998		RE offense 8: Plea of not guilty
04/29/1998		RE offense 9: Plea of not guilty
04/29/1998		RE offense 10: Plea of not guilty
04/29/1998		RE offense 11: Plea of not guilty
04/29/1998		RE offense 12: Plea of not guilty
04/29/1998		RE offense 13: Plea of not guilty
04/29/1998		RE offense 14: Plea of not guilty
04/29/1998		RE offense 15: Plea of not guilty
04/29/1998		RE offense 16: Plea of not guilty
04/29/1998		RE offense 17: Plea of not guilty
04/29/1998		RE offense 18: Plea of not guilty
04/29/1998		Deft released on personal recognizance
04/29/1998		Defendant Serving Sentence Bail Warnings To Be Read At Time Bail Is Set
04/29/1998		Continued until 5-18-98 For PTC
04/29/1998		Reporter present: Barbara Marigliano
04/29/1998	5.0	Commonwealth Files Statement Of The Case
05/18/1998		Continued until 6/9/98 Nem
05/18/1998		Reporter present: Joan CAve
05/18/1998	6.0	Pre-trial conference report filed in court
06/09/1998		Continued until 7/6/98 ATD?LC
06/09/1998		Reporter present: Barbara Marigliano
06/09/1998	7.0	Motion by Deft: For Discovery And Production Of Discoverable Information
06/30/1998		Continued until 08/19/98 Filing Motion to Suppress
06/30/1998		Reporter present: Barbara Marigliano
07/01/1998	8.0	Writ of Habeas Corpus issued to Southeastern Correctional Center (Bridgewater) 07/06/98
08/19/1998		Continued until 10/19/98 Motion to Suppress
08/19/1998		Reporter present: Debbie Belanger
10/15/1998	9.0	Writ of Habeas Corpus issued to Southeastern Correctional Center (Bridgewater) for 10/19/98
10/19/1998		Continued until 12/16/98 Motion to Suppress
10/19/1998		Reporter present: Barbara Gandolfo
10/19/1998		Bail set: Parties Came Before The Court (Paul A Chernoff, Justice) To

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Commonwealth v Murphy, John D.

Date	Paper	Text
		Argue Bail New Bail \$7500 Cash
10/19/1998		Bail warning given in open Court. Mittimus Issued
10/19/1998		Reporter present: Barbara Gandolfo
12/09/1998	10.0	Writ of habeas corpus issued MCI Bridgewater S.E.C.C. for 12/16/98
12/16/1998		Continued until 2/24/99 Motion to Suppress & 4/1/99 Trial
12/16/1998		Reporter present: Debbie Belanger
12/16/1998	11.0	Motion by Deft: To Dismiss And/Or Suppress Statements And Evidence With An Affidavit Attached Filed In Court
01/22/1999	12.0	Bail satisfied: \$7,500. (Red #8638) Surety: Lori A Barrett
02/24/1999		Continued until 03/15/99 Status
02/24/1999		Reporter present: Barbara Gandolfo
03/15/1999		Continued until 04/26/99 Motion to Suppress & 06/08/99 Trial
03/15/1999		Reporter present: Barbara Gandolfo
04/26/1999		Continued until 06/22/99 Motion to Suppress & 08/10/99 Trial
04/26/1999		Reporter present: Paula Connelly
04/29/1999		Writ of Habeas Corpus issued to Suffolk County Jail (Nashua Street) for 05/05/99
05/05/1999		Continued until 06/22/99 Motion to Suppress
05/05/1999		Reporter present: Lisa Napolitano
05/05/1999	13.0	Habeas corpus for Deft Returned Without Service
05/05/1999		Appearance of Commonwealth's Atty: Jalelian
05/05/1999		Motion To Increase Bail Allowed After Hearing Bail Set:\$50,000 Cash
05/05/1999		Mittimus Issued
05/05/1999		Bail Warnings Read In Open Court
05/05/1999		Reporter present: Lisa Napolitano
05/05/1999	14.0	Motion by Commonwealth: To Increase Bail Based On Changed Circumstances
05/05/1999		Motion (P#14) Allowed Bail Increased \$42,500 To Total \$50,000 (Catherine A White, Justice)
06/14/1999		writ of habeas corpus issued to Keeper Jail Nashua St. 06/22/99
06/21/1999		Continued until 08/19/99 Motion to Suppress
06/21/1999		Reporter present: Harriet Sears
06/22/1999		\$7,500 Cash Bail Is Ordered Returned To The Surety Defendants Bail Remains At \$50,000 Cash (Thomas E Connolly, Justice)
06/22/1999	15.0	Habeas Corpus For Deft Returned without Service
08/11/1999		Writ of Habeas Corpus to receive issued to Cambridge Jail. 8/19/99
08/19/1999		Continued until 10/01/99 Motion to Suppress
08/19/1999		Reporter present: Harriet Sears
10/01/1999		Continued until 10/27/99 Motion to Suppress
10/01/1999		Reporter present: John Lynch
10/20/1999		Habeas corpus for Deft at Keeper of the Jail Nashua Street for 10/27/99
10/27/1999		Continued until 11/04/1999 Status
10/27/1999		Reporter present: Diane Grasso
10/27/1999	16.0	Habeas corpus for Deft returned without service
11/04/1999		Continued until 11/19/1999 Motion to Suppress

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Commonwealth v Murphy, John D.

Date	Paper	Text
11/04/1999		Reporter present: Paula Connelly
11/10/1999		Habeas corpus for Deft MCI Concord for 11/19/99
11/15/1999		Habeas corpus for Deft at MCI Concord
11/15/1999	17.0	Request For Advancement Filed And Allowed (Charles Grabau, Justice)
11/15/1999		Advanced to 11/17/99 for Motion to Suppress
11/17/1999		Sent to Session 8 Motion to Suppress
11/17/1999	17.1	Motion by Deft: to dismiss -lack of evidence
11/17/1999		Motion (P#17.1) filed in court and set for hearing on 12-1-99 in 16A (Spurlock,J)
11/22/1999	17.2	Deft files memorandum in support of motion to suppress
11/22/1999	17.3	Commonwealth files proposed findings of fact and rulings of law
12/13/1999		Habeas corpus for Deft at M,C,I at Concord, for 12/16/99
12/16/1999	18.0	Motion by Deft: to dismiss with an affidavit and memorandum attached
12/16/1999		Motion (P#18) After a review of the Grand Jury minutes the motion is Denied as to all counts except count 013 & 006 which the commonwealth indicated in open court it was dismissing (Spurlock,J)
12/17/1999		Motion (P#11) Denied. By the Court, Spurlock, J
12/17/1999	19.0	Commonwealth files bill of particulars
12/17/1999	20.0	Rulings of law, and order on defendants motion to suppress evidence and statements Re: for the foregoing reasons it is hereby ORDERED that the defendants motion to suppress statements and evidence is DENIED (Spurlock,J)
12/20/1999		RE Offense 6:Dismissed
12/20/1999		RE Offense 13:Dismissed
12/22/1999	21.0	Defendant's Notice of Interlocutory Appeal.
01/10/2000	22.0	Motion by Commonwealth: To Dismiss
01/10/2000	23.0	SJC-Notice of Docket Entry: You are hereby notified that on 1/5/00 the following was entered on the docket of hte above referenced case: Memorandum & Order, as on file. (Interlocutory appeal) Denied. (Spina, J.)
02/02/2000	24.0	Motion by Deft:to convert trial date to lobby conference date filed in court and allowed
02/02/2000		Continued until 2-16-00 Lobby (Grabau,J)
02/10/2000		Habeas corpus for Deft at M.C.I. at Concord for 2/16/00
02/16/2000	25.0	Habeas corpus for Deft returned without service
02/18/2000	26.0	Habeas corpus for Deft at Cambridge Jail for 2/28/00
02/28/2000	27.0	Motion by Deft: Ex Parte motion for funds for expert witness with affidavit attached filed in court
02/28/2000		Motion (P#27) Allowed up to \$2000 (Fahey,J)
02/28/2000		Motion by Deft: Verbal to withdraw and of her review motion is denied (Fahey,J)
03/23/2000		Filed by Deft. Attorney: Notice of Change of Address and Affiliation
04/18/2000	28.0	Request by defendant for continuance allowed (Gants,J)
04/18/2000		Continued until 5-19-00 Trial
05/11/2000		Habeas corpus for Deft at MCI Concord for 5/19/00
05/19/2000		Sent to 6A for trial

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Commonwealth v Murphy, John D.

Date	Paper	Text
05/24/2000		Returned to First Session
05/24/2000		Continued until 6/8/00 for ATD
05/24/2000		Reporter present: John Lynch
06/08/2000		Continued until 08/07/2000 Trial
06/08/2000		Reporter present: John Lynch
06/13/2000		Habeas corpus for Deft at MCI at Concord for 6/15/00
06/27/2000	29.0	Commonwealth files Proposed Witness List
08/18/2000	30.0	Motion by Deft: To Transfer Prior to Trial with Affidavit in Support of Motion to Transfer Prior To Trial
08/18/2000		Motion P#30 No Action Taken (Charles Grabau, Justice) notice sent
08/18/2000	31.0	Ex Parte Motion by Deft: For Funds For Expert Witness with Affidavit in Support of Motion For Funds For Expert Witness
08/18/2000		Motion (P#31) allowed in an amount not to exceed \$1,500.00 (Charles M. Grabau, R. A. J.) certified copy sent to deft's counsel
08/25/2000	32.0	Deft files Proposed Witness and Exhibit List
08/29/2000		Habeas corpus for Deft at MCI at Concord for 9/5/00
09/01/2000	33.0	Deft files amended proposed witness and exhibit list
09/05/2000	34.0	Motion by Deft: For Examination Of Jurors. Filed In Court
09/05/2000	35.0	Motion by Deft: For Sequestration Of Witnesses. Filed In Court.
09/05/2000		Motion (P#35) allowed (Sandra L. Hamlin, Justice)
09/05/2000	36.0	Motion by Deft: In Limine To Exclude Prior Bad Acts And Irrelevant Business Records. Filed In Court
09/05/2000	37.0	Motion by Commonwealth: To Admit Evidence Of Items Found In The Defendant's Car Upon Arrest For Limited, Permissible Purpose Of Modus Operandi. Filed In Court
09/05/2000	38.0	Motion by Commonwealth: To Admit Registry Of Motor Vehicle Documents. Filed In Court
09/05/2000	39.0	Motion by Commonwealth: To Admit Cash Register Receipts From Sears And Circuit City Which Are Duplicates Of Computer Files And Business Records. Filed In Court
09/05/2000	40.0	Motion by Commonwealth: To Admit Photocopies Of Sales receipt From Sears And Circuit City. Filed In Court. Filed In Court
09/05/2000	41.0	Motion by Commonwealth: To Admit Evidence Of Prior Bad Acts For Limited, Permissible Purposes. Filed In Court.
09/05/2000	42.0	Motion by Deft: To Admit Photocopies Of Bank Records Of Belmont Savings Bank, Filed In Court.
09/05/2000		Motion P#42 Issue Moot. (Hamlin, J.)
09/05/2000	43.0	Motion by Deft: For Correct Indictments. Filed In Court
09/06/2000		Motion (P#43) allowed (Sandra L. Hamlin, Justice)
09/06/2000	44.0	Commonwealth files Witness List. Filed In Court
09/12/2000	45.0	Commonwealth files Amended Bill Of Particulars
10/10/2000		Defendant's Motion (see P#34) See record. (Hamlin, J.)
10/10/2000		Defendant's Motion (P#36) Allowed in part and Denied in part. (See Record) (Hamlin, J.)
10/10/2000		Motion (P#37) after hearing motion allowed as to certain items (Hamlin, J.)

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Date	Paper	Text
10/10/2000		Motion (P#38) motion allowed after hearing (Sandra L. Hamlin, Justice)
10/10/2000		Motion (P#39) allowed after hearing (Sandra L. Hamlin, Justice)
10/10/2000		Motion (P#40) allowed after hearing (Sandra L. Hamlin, Justice)
10/10/2000	46.0	Motion by Commonwealth: In Limine Regarding Demonstrative Charts, And A Powerpoint Demonstration
10/10/2000		Commonwealth's Motion (see P#46) allowed in part and denied in part. (Sandra L Hamlin, Justice)
10/10/2000	47.0	Motion by Deft: In Limine To Admit Evidence filed in Court
10/10/2000		Motion (P#47) after hearing allowed (Sandra L. Hamlin, Justice)
10/12/2000		Juror #6 Roberta White excused from the panel.
10/13/2000	48.0	Commonwealth: Request For Jury Instructions filed in Court
10/16/2000	49.0	Defendant's Request for Jury Instructions I, filed in Court
10/16/2000		Juror #1 Sharon Bryan excused from the panel.
10/17/2000	50.0	Motion by Deft: For Required Finding Of Not Guilty At Close Of Commonwealth's Case, filed in Court
10/17/2000		Motion (P#50) At the close of the Commonwealth's case and after hearing, motion Denied as to all indictments (Sandra L. Hamlin, Justice)
10/17/2000	51.0	Motion by Deft: For Required Finding Of Not Guilty At Close Of All The Evidence filed in Court
10/17/2000		Motion (P#51) At the close of all the evidence and after hearing, motion denied (Sandra L. Hamlin, Justice)
10/18/2000	52.0	Request for Jury Instructions II, filed in Court
10/18/2000	53.0	Verdict Slips - Verdict of guilty offenses , 001, 002, 003, 004, 005, 007, 008, 009, 010, 011, 012 and 014, 015, 016, 017 and 018.
10/18/2000		RE Offense 1:Guilty verdict
10/18/2000		RE Offense 2:Guilty verdict
10/18/2000		RE Offense 3:Guilty verdict
10/18/2000		RE Offense 4:Guilty verdict
10/18/2000		RE Offense 5:Guilty verdict
10/18/2000		RE Offense 7:Guilty verdict
10/18/2000		RE Offense 8:Guilty verdict
10/18/2000		RE Offense 9:Guilty verdict
10/18/2000		RE Offense 10:Guilty verdict
10/18/2000		RE Offense 11:Guilty verdict
10/18/2000		RE Offense 12:Guilty verdict
10/18/2000		RE Offense 14:Guilty verdict
10/18/2000		RE Offense 15:Guilty verdict
10/18/2000		RE Offense 16:Guilty verdict
10/18/2000		RE Offense 17:Guilty verdict
10/18/2000		RE Offense 18:Guilty verdict
10/18/2000		Commonwealth moves for sentence.
10/18/2000		Continued until October 19, 2000 at 10:00am for disposition.
10/18/2000		BAIL REVOKED.(Sandra L Hamlin, Justice)
10/18/2000		Defendant committed into custody of Sheriff.
10/18/2000		Mittimus without bail issued to custody of Sheriff

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Commonwealth of Massachusetts
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Date	Paper	Text
10/19/2000		Sentence imposed: Offenses 001, 002, 003, 004, 005, 007, 008, 009 - MCI, Cedar Junction for a term not exceeding 5 yrs or less than 4 & 1/2 yrs. Offenses 002, 003, 004, 005, 007, 008 and 009 to be served concurrently with the sentence imposed this day in offense 001. . Offense 010 MCI, Cedar Junction for a term not exceeding 5 yrs or less than 4 & 1/2 yrs. to take effect from and after the expiration of sentence imposed this day in offenses 001 thru 009. Offenses 011, 012, 014 and 015 MCI, Cedar Junction for a term not exceeding 5yrs or less than 4 & 1/2yrs to be served concurrently with the sentence imposed this day in offense 010. Offenses 016 and 017 MCI, Cedar Junction for a term not exceeding 10yrs of less than 9 yrs to be served concurrently with the sentence imposed this day in offense 001. Offense 018 Filed by Order of Hamlin, J. deft not objecting thereto (Hamlin, J.)
10/19/2000		Sentence credit given as per 279:33A: 109 days
10/19/2000		Victim-witness fee assessed: \$60. thru institution (Hamlin, J.)
10/19/2000		Custody of Sheriff revoked
10/19/2000		Mittimus issued to MCI, Cedar Junction
10/19/2000		Notified of right of appeal under Rule 64
10/19/2000		Notified of right of appeal under Rule 65
10/19/2000		List of Exhibits filed
10/19/2000		Attested copies of indictments sent to MCI Cedar Junction and abstract on offense 018 sent to Registrar of Motor Vehicles.
10/19/2000		Reporter present: Lisa Napolitano
10/19/2000	54.0	Notice of Appeal of certain opinions, rulings, directions and judgments of the Court, filed in Court (copy to Judge & ADA)
10/19/2000	55.0	Attorney Jeruchim's Motion to Withdraw and Appointment of Appellate Counsel filed in Court
10/19/2000		Motion (P#55) after hearing, motion allowed subject to Appellate review of the sentences. (Hamlin, J.) copy sent to atty and CPCS
10/24/2000	56.0	Mittimus returned committing defendant into custody of Sheriff with service
10/25/2000	57.0	Defendant's Appeal from Sentence to MCI, Cedar Junction to the Appellate Division of the Superior Court (Judge notified)
10/26/2000		Court Reporter Barbara Gandolfo is hereby notified to prepare one copy of the transcript of the evidence of 11/17/1999.
10/26/2000		Court Reporter Robert Jacques is hereby notified to prepare one copy of the transcript of the evidence of 02/28/2000 Lobby conference.
10/26/2000		Court Reporter Lisa Napolitano is hereby notified to prepare one copy of the transcript of the evidence of 10/10, 11, 12, 13, 16, 17, 18 and 19, 2000 Pretrial motions, Trial and Disposition before Judge Hamlin
10/26/2000	58.0	Mittimus MCI, Cedar Junction offenses (001,2,3,4,5,7,8 & 9); (010,011,012 & 014); (015); (016) and (017) returned with service.
10/27/2000		Attested copies of indictments, mittimus and docket entries sent to the Clerk of the Appellate Division this day.

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Commonwealth v Murphy, John D.

Date	Paper	Text
11/01/2000	59.0	Appointment of Counsel Angela G Lehman
11/06/2000		Victim-witness fee paid as assessed \$60.00
11/27/2000		Appearance of Deft's Atty: Angela G Lehman

59 Mass. App. Ct. 571, *; 797 N.E.2d 394;
2003 Mass. App. LEXIS 1096, **

119Z7F

COMMONWEALTH vs. JOHN D. MURPHY.

No. 01-P-592

APPEALS COURT OF MASSACHUSETTS

59 Mass. App. Ct. 571; 797 N.E.2d 394; 2003 Mass. App. LEXIS 1096

**October 17, 2002, Argued
October 15, 2003, Decided**

PRIOR HISTORY: [**1] Middlesex. Indictments found and returned in the Superior Court Department on April 23, 1998. The cases were tried before Sandra L. Hamlin, J.

DISPOSITION: Judgments affirmed.

LexisNexis (TM) HEADNOTES - Core Concepts:

COUNSEL: Angela G. Lehman for the defendant.

Sheryl F. Grant, Assistant District Attorney, for the Commonwealth.

JUDGES: Present: Gelinas, Doerfer, & Green, JJ.

OPINIONBY: GELINAS

OPINION:

[*572] GELINAS, J. The defendant, John D. Murphy, was indicted in Middlesex Superior Court on fourteen counts of larceny over \$ 250 (*G. L. c. 266, § 30*), and one count each of fraudulent use of a credit card to obtain money or goods (*G. L. c. 266, § 37C*); forgery of a record/return or writing (*G. L. c. 267, § 1*); uttering (*G. L. c. 267, § 5*); and falsifying or stealing a driver's license (*G. L. c. 90, § 24B*). Two counts of larceny over \$ 250 subsequently were dismissed by the Commonwealth. After trial, a jury returned verdicts of guilty on the remaining sixteen counts. Murphy appeals from the convictions, n1 claiming (1) error in the trial court's refusal to strike the conclusions of a handwriting expert, and to limit the use by the expert of [**2] certain standards of comparison; (2) that the trial judge committed reversible error in arbitrarily finding that a bank signature card was a legal document within the meaning of *G. L. c. 267, § 1*; (3) that there was insufficient evidence to support convictions of larceny over \$ 250, forgery, and uttering; (4) that the trial court

committed reversible error in failing to declare a mistrial after discovering that a juror was a close friend of, and had engaged in discussion with, an attorney, not the trial attorney, who represented Murphy in a different pending criminal matter; and (5) that certain indictments should have been dismissed, as the Commonwealth had presented misleading and insufficient evidence to the grand jury. We affirm.

N1 The defendant's conviction for falsifying or stealing a driver's license was placed on file without objection and is not here at issue.

We summarize the facts, adding detail as necessary to a discussion of the issues. Between January 31, 1997, and July 3, 1998, the [**3] identities of six different people were stolen. n2 Through use of these identities; televisions, video cassette recorders, [*573] furniture, and computers, to the value of at least \$ 17,000, were obtained from different vendors, including several stores operated by Sears and Circuit City. In addition, the stolen identities were used to open bank accounts and accounts at Mailboxes, Etc. It is undisputed that the six people whose identities were used, all named either John Murphy or Michael Sullivan, did not purchase the goods or open the accounts in question.

n2 Identity theft occurs when someone appropriates a person's personal information without that person's knowledge to commit fraud or theft. It is accomplished by co-opting a person's name, social security number, credit card number, or some other piece of personal information for illicit use. See generally <http://www.consumer.gov/idtheft>, an Internet Web site maintained by the Federal Trade Commission.

59 Mass. App. Ct. 571, *; 797 N.E.2d 394;
2003 Mass. App. LEXIS 1096, **

As a result of investigation, the defendant was arrested. In [**4] the course of the arrest, the police recovered, from a vehicle he had rented and in which he was seated at the time of arrest, various credit cards, receipts, checks, invoices, bank receipts, other commercial documents, and three birth certificates. We review each of the defendant's claimed errors in turn.

Handwriting Analysis. At trial, the Commonwealth called Nancy McCann as a witness. After hearing testimony concerning her credentials, the judge allowed her to testify as a handwriting expert. The defendant timely moved to strike a number of exhibits she had used as standards of comparison for the defendant's signature. n3 These included seven letters sent to the clerk of the Middlesex Superior Court, all relating to the case pending against the defendant and signed "John Murphy," and eight documents bearing the signature "Michael Sullivan," found in the car the defendant had rented and was operating at the time of his arrest. The defendant claims that, without testimony by persons who saw him sign each exemplar used as a standard of comparison, the documents should not have been admitted, or, in the alternative, the trial judge should have given a limiting instruction. Murphy [**5] contends that failure either to strike or give the instruction impermissibly shifted the burden of proof.

n3 The defendant made no objection regarding the use of the defendant's signature from (1) the Miranda card and the booking sheet he signed when arrested; (2) a redacted bail recognizance form and a redacted affidavit of indigency form he signed at arraignment; (3) a "Michael Sullivan" signature from a bank signature card; and (4) a "Michael Sullivan" signature from a license that the defendant had procured. All were used as standards of comparison.

To have them admitted, the Commonwealth was required to show by a preponderance of the evidence that the defendant signed the exemplars. See *Commonwealth v. Polian*, 288 Mass. 494, 499, 193 N.E. 68 (1934). It was for the trial judge to determine whether [**574] the Commonwealth satisfied its burden. There was here ample evidence to support the trial judge's preliminary finding to that effect. As to the letters, they were addressed to the court clerk. They [**6] requested information about the defendant's case, included the case docket number, and bore the signature "John Murphy." As to the "Michael Sullivan" signatures, they were affixed to documents found in the rented car being driven by the defendant at the time of his arrest. In addition, two

of those documents bore the defendant's picture next to the "Michael Sullivan" signature, and there was evidence from a bank employee that the defendant had produced a license showing that he was "Michael Sullivan" when he signed another of the documents.

It is not obvious to us, and the defendant proposes no intelligible basis to believe, that the judge's well-supported preliminary evidentiary determination somehow shifted an impermissible burden onto the defendant or otherwise prejudiced him in any way. The judge's preliminary findings were not communicated to the jury. Neither did admitting the exemplars create any presumption or compel any conclusion. Instead, the judge left it to the jury to draw their own fair inferences. There was no error.

The defendant next argues that the judge erred in failing to strike McCann's testimony as to certain conclusions she reached with respect to the authorship [**7] of the questioned signatures. n4 No objection or motion to strike was taken at the time McCann initially testified; the defendant did not move to strike the testimony until the following day, after lengthy cross-examination. The objections and motions to strike were not timely. See *Commonwealth v. Silvia*, 343 Mass. 130, 135-136, 177 N.E.2d 571, (1961) (objections "must be taken to evidence when it is offered"); *Commonwealth v. Wood*, 17 Mass. App. Ct. 304, 307, 457 N.E.2d 1131 (1983); *Commonwealth v. Pagano*, 47 Mass. App. Ct. 55, 59, 710 N.E.2d 1034 (1999), cert. denied, 528 U.S. 1089, 145 L. Ed. 2d 690, 120 S. Ct. 820 (2000). We review only to determine whether an error occurred that created a substantial [**575] risk of a miscarriage of justice. See *Commonwealth v. Epsom*, 399 Mass. 254, 259-260, 503 N.E.2d 954 (1987).

n4 The testimony included statements that "it is highly probable that all of the questioned John Murphy and M. Sullivan signatures appearing on the various charge slips . . . were written by the same individual," and that "it is more probable than not that all of the questioned signatures were written by the same person who authored the numerous John Murphys and Michael Sullivan signatures."

[**8]

Citing to *United States v. Hines*, 55 F. Supp. 2d 62 (D. Mass. 1999), the defendant argued at trial, and argues again on appeal, that conclusions by a handwriting expert should not be considered because of weaknesses in their scientific reliability. n5 The defendant, however, never requested a Lanigan hearing, see *Commonwealth v. Lanigan*, 419 Mass. 15, 24-27, 641 N.E.2d 1342 (1994),

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to determine whether McCann could testify as to her conclusions regarding the handwriting exemplars. Had he wanted to challenge the scientific reliability of McCann's testimony, he should have filed a motion for a hearing prior to the introduction of the evidence. See *Commonwealth v. Sparks*, 433 Mass. 654, 659, 746 N.E.2d 133 (2001) (to preserve an objection based on scientific unreliability, defendant must file an appropriate pretrial motion stating the grounds for the objections, and must request a hearing in accordance with the principles set forth in *Canavan's Case*, 432 Mass. 304, 309-312, 733 N.E.2d 1042 [2000], and *Commonwealth v. Lanigan*, *supra*). Because the defendant did not object until after McCann had [*9] testified, there was no voir dire hearing regarding the scientific reliability of McCann's testimony. See *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 592, 125 L. Ed. 2d 469, 113 S. Ct. 2786 (1993).

n5 In *Hines*, the defendant moved prior to trial, in accordance with *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 125 L. Ed. 2d 469, 113 S. Ct. 2786 (1993), and *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 143 L. Ed. 2d 238, 119 S. Ct. 1167 (1999), to exclude the entire testimony of the government's handwriting expert on grounds that such evidence was not scientifically reliable. Applying the four principles laid out in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, *supra* at 592-595 (i.e., [1] whether the expert's technique can be or has been tested; [2] whether the method has been subjected to peer review and publication; [3] the known or potential rate of error of the technique; and [4] whether there is "general acceptance" of the technique within the relevant scientific community, to the extent that one exists), the trial judge admitted the expert's testimony concerning similarities and dissimilarities between known exemplars of the defendant's handwriting and a note used in an armed robbery, and that the writings were consistent with each other, but declined to permit the expert to give any ultimate conclusions as to authorship.

[**10]

Unlike the case in *Sparks*, the defendant here did raise the issue after McCann testified, and again after extensive cross-examination. We consider whether the argument has merit, and whether the trial judge abused her discretion or committed error of law resulting in a substantial risk of a miscarriage of justice. [*576] See and compare *Canavan's Case*, *supra* at 312. We conclude that the testimony of a handwriting expert

about who wrote or signed a document is of that variety of "soft science" that is highly dependent on information derived from such sources as personal observations, clinical assessments, and statistical data, and as such we defer especially to the judge's exercise of discretion. *Id.* at 318.

Additionally, the opinion of a handwriting expert as to the probability of authorship has a long history of acceptance in our jurisprudence. See, e.g., *Commonwealth v. Buckley*, 410 Mass. 209, 213-214, 571 N.E.2d 609 (1991) (two handwriting experts testified that handwriting "matched" and defendant "probably" wrote the document, while third testified that there was the "highest probability" that the defendant wrote the document); *Commonwealth v. Romero*, 25 Mass. App. Ct. 51, 52, 514 N.E.2d 1333 (1987) [*11] (evidence jury could consider included testimony of handwriting expert that "a great many names" appeared to have been written by the same person); *Commonwealth v. Lima*, 29 Mass. App. Ct. 490, 497, 562 N.E.2d 100 (1990) (handwriting expert opined that, based on court documents, the defendant signed an auto rental agreement). We conclude that, as the courts in Massachusetts have long accepted as reliable expert testimony about the authorship of handwriting, a Lanigan hearing was not necessary even had one properly been requested. See *Commonwealth v. Frangipane*, 433 Mass. 527, 538, 744 N.E.2d 25 (2001) (Lanigan hearing not necessary where qualified expert testimony has been accepted as reliable in the past in Massachusetts appellate cases). n6 There was no abuse of discretion or error of law in admitting the challenged testimony.

n6 We see nothing in *Frangipane* that would preclude a party from requesting a Lanigan hearing should science in the particular field advance to a point where expert testimony, generally accepted as reliable in the past, would no longer be so considered. The defendant here makes no such claim; he contends only that the principles explained in *Daubert* and *Lanigan* now affect testimony by experts in the field of handwriting analysis.

[**12]

Bank signature card. The defendant next argues that the trial judge erred as matter of law when she ruled that the bank signature card he used to open a fictitious checking account was a document capable of being forged and uttered under G. L. c. 267, § 1, 5. n7 [*577] He argues that, as the statute contains no specific reference to a bank signature card, he cannot be convicted under its terms. That view of the statute would

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permit a person, with intent to defraud, to sign signature cards and open accounts in other people's names and face no penalty for doing so. See *Commonwealth v. Dale D.*, 431 Mass. 757, 760, 730 N.E.2d 278 (2000). We conclude, rather, that a bank signature card constitutes "evidence or muniment of title to property" and, thus, is a document capable of being forged and altered under the statute.

n7 *General Laws c. 267, § 1*, as amended through St. 1986, c. 557, § 190, provides, in relevant part: "Whoever, with intent to injure or defraud, falsely makes, alters, forges or counterfeits . . . an accountable receipt for money, goods or other property; or a stock certificate, or any evidence or muniment of title to property; . . . shall be punished by imprisonment in the state prison for not more than ten years or in jail for not more than two years." (Emphasis supplied.)

General Laws c. 267, § 5, provides: "Whoever, with intent to injure or defraud, utters and publishes as true a false, forged or altered record, deed, instrument or other writing mentioned in the four preceding sections, knowing the same to be false, forged or altered, shall be punished by imprisonment in the state prison for not more than ten years or in jail for not more than two years."

[**13]

As a general rule, "a statute [must be interpreted] in accord with 'the intent of the Legislature ascertained from all its words construed by the ordinary and approved usage of the language, considered in connection with the cause of its enactment, the mischief or imperfection to be remedied and the main object to be accomplished, to the end that the purpose of its framers may be effectuated, *Telesetsky v. Wight*, 395 Mass. 868, 872-873, 482 N.E.2d 818 (1985), . . . and to avoid imputing a 'barrenness of accomplishment,' *Plymouth County Retirement Ass'n. v. Commissioner of Pub. Employee Retirement*, 410 Mass. 307, 312, 571 N.E.2d 1386 (1991)." *Champigny v. Commonwealth*, 422 Mass. 249, 251, 661 N.E.2d 931 (1996). While the words "evidence or muniment of title" appear directly after a specific type of document, a stock certificate, we read the words in question in the disjunctive, as the word "or" appears after the words describing several specific types of documents. See *Commonwealth v. Davie*, 46 Mass. App. Ct. 25, 27, 703 N.E.2d 236 (1998). The use of the disjunctive "or" serves to distinguish between the types [**14] of documents [**578] contemplated. The clause

can easily be understood to read that any document that is either evidence of title to property, or a muniment n8 of title to property, may be the subject of forgery and uttering under the statute. The phrase "evidence of title" may refer to either personal or real property. Compare *Greeley v. Flynn*, 310 Mass. 23, 26, 36 N.E.2d 394 (1941) (gift of bank book, which was evidence of title, was shown by delivery of the book); and *Long v. Wickett*, 50 Mass. App. Ct. 380, 382 n.3, 737 N.E.2d 885 (2000). We think the same principle is applicable to a muniment of title to property. There was testimony at trial that the bank signature card was evidence of title to the bank account. Certainly, a signature card would constitute evidence by which one could defend title to a bank account. A bank signature card is evidence of ownership of the account. See *Doran v. Nally*, 10 Mass. App. Ct. 893, 409 N.E.2d 1321 (1980). Under the plain language of the statute, the Legislature intended to punish those who forged documents with the intent to injure or defraud, see *G. L. c. 267, § 1*. We are [**15] mindful that criminal statutes must be strictly construed against the government, that is, a penal statute must define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited. See *Commonwealth v. George*, 430 Mass. 276, 278, 717 N.E.2d 1285 (1999). In abiding by the strict construction rule, however, the Commonwealth is permitted an "available and sensible interpretation," *Commonwealth v. Wotan*, 422 Mass. 740, 743, 665 N.E.2d 976 (1996), quoting from *Commonwealth v. Roucoulet*, 413 Mass. 647, 652, 601 N.E.2d 470 (1992), as we think obtains here. We conclude that the judge properly found that the bank signature card was a document both capable of being forged under *G. L. c. 267, § 1*, and uttered under *G. L. c. 267, § 5*. Compare *Commonwealth v. Gall*, 58 Mass. App. Ct. 278, 288-290, 789 N.E.2d 586 (2003) (certificate of insurance not evidence of muniment of title).

n8 Black's Law Dictionary 1038 (7th ed. 1999) defines "muniment" as a "document (such as a deed or charter) evidencing the rights or privileges of a person, family, or corporation." Webster's Third New International Dictionary 1487 (3d ed. 1993) defines "muniment" as documentary evidence by which one can defend a title to property or a claim to rights.

[**16]

Sufficiency of the evidence. Deciding, as we do, that the trial judge properly admitted both the handwriting expert's opinions and the bank signature card, it necessarily follows that the [**579] evidence, when viewed in the light most favorable to the

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Commonwealth, was sufficient to permit the jury to infer the existence of the essential elements of larceny over \$ 250, forgery and uttering. *Commonwealth v. Latimore*, 378 Mass. 671, 676-677, 393 N.E.2d 370 (1979). The judge did not err in denying the defendant's motions for required findings.

Juror Issue. During jury selection process, one of the jurors indicated that his father-in-law was a former United States Attorney, and that his cousin was a police officer. On the fifth day of trial, this same juror informed the court that, while the trial was ongoing, he spoke with an individual at a social gathering and learned that the defendant had other criminal matters pending in Suffolk Superior Court. At a hearing on the matter, the juror informed the judge that "somebody let out that they knew that the defendant had another criminal proceeding before the court." n9 The juror said that he had not spoken to any of the [**17] other jurors about the matter, and assured the judge that he could remain fair and impartial. n10 Based upon these representations, the defendant and his trial counsel did not move to dismiss the juror or seek a mistrial. The judge found the juror to be credible when he said that he had not talked to any of the other jurors about the matter, found that the juror remained fair and impartial, and permitted him to remain on the jury.

n9 When asked to relate the specifics of the conversation, the juror stated that the other person, after finding out the name of the trial judge, stated, "Oh, that's the John Murphy case. He's got another one too."

n10 At the hearing, when asked if he could remain fair and impartial, the juror stated: "Absolutely. I think it is completely irrelevant to this matter at hand. And in this country, you're innocent until proven guilty. And it is completely irrelevant as far as I'm concerned. And I only mentioned it because I thought the defendant was entitled to have, you know, the best, fairest hearing possible, which is why I wanted to bring it up to everybody's attention. It has no impact on me whatsoever."

[**18]

That evening, the defendant called Robert Fox, his trial counsel in the other case. The following day, the defendant reported to the court that Fox told him he (Fox) had run across the juror and related that Fox was the defendant's criminal attorney on the unrelated matters. The trial court ordered Fox to appear in court and then conducted a further hearing. In response to the judge's questions, Fox indicated that the juror was one of

his best friends. Fox further advised the judge that prior to this [*580] trial, he and the juror had had many discussions about his criminal defense work and the judicial system. Upon this information, the defendant's trial counsel moved for a mistrial and objected to the juror's continued participation in the trial. The trial judge made further findings as to the credibility of Fox and the juror, renewed her finding that the juror remained impartial and unbiased, denied the motion for a mistrial, and permitted the juror to remain.

The defendant argues that a high probability of prejudice exists because this juror (who had relatives in law enforcement) acquired knowledge of Murphy's open criminal matters, and that this high probability of prejudice required [**19] the trial judge either to declare a mistrial or, at least, to remove the juror from the panel. See *United States ex rel. Owen v. McMann*, 435 F.2d 813, 818 (2d Cir. 1970), cert. denied, 402 U.S. 906, 28 L. Ed. 2d 646, 91 S. Ct. 1373 (1971). The defendant admits that there is no evidence of any communication with other jurors, and our review of the record finds no direct evidence of bias or partiality. Nonetheless, we recognize, as the defendant argues, that "in a criminal case, any private communication, contact, or tampering, directly or indirectly, with a juror during a trial about the matter pending before the jury, is, for obvious reasons, deemed presumptively prejudicial." *Remmer v. United States*, 347 U.S. 227, 229, 98 L. Ed. 654, 74 S. Ct. 450 (1954).

In *Remmer*, the defendant, charged with income tax evasion, learned that in the course of the trial someone suggested to a juror that the juror could profit by bringing in a verdict favorable to the defendant. After investigation, the prosecutor and the trial judge determined that the remark had been made in jest and could therefore be ignored. Contrarily, the Supreme Court held that, under [**20] the circumstances, the remark had to be deemed presumptively prejudicial to the defendant and that he was entitled to a hearing to determine if, in fact, he had been prejudiced by the contact. *Id.* at 229-230. Here, by contrast, the trial judge conducted an appropriate hearing, taking the additional step of requiring the defendant's other attorney to appear and testify. After hearing, the trial judge determined that both the juror and Fox were credible, and that the juror remained impartial and unbiased.

"The constitutional standard of fairness requires only that the [*581] jurors be impartial and indifferent." *Commonwealth v. Daughtry*, 417 Mass. 136, 147, 627 N.E.2d 928 (1994), quoting from *Commonwealth v. Jackson*, 376 Mass. 790, 799, 383 N.E.2d 835 (1978). "Juror bias is a question of fact to be determined by the judge. A finding that a juror is impartial will not be overturned on appeal unless the defendant makes a clear showing of abuse of discretion or that the finding was

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clearly erroneous." *Commonwealth v. Emerson*, 430 Mass. 378, 384, 719 N.E.2d 494 (1999), cert. denied, 529 U.S. 1030, 146 L. Ed. 2d 333, 120 S. Ct. 1446 (2000). [**21] In part, a judge's determination of impartiality rests on her determination of the credibility of those testifying. "The determination of a juror's impartiality 'is essentially one of credibility, and therefore largely one of demeanor' In such circumstances, we give a trial judge's determination of impartiality great deference." *Commonwealth v. Ferguson*, 425 Mass. 349, 352-353, 680 N.E.2d 1166 (1997), quoting from *Patton v. Yount*, 467 U.S. 1025, 1038, 81 L. Ed. 2d 847, 104 S. Ct. 2885 (1984). As well, the mere fact that a juror knows a police officer or prosecutor, or is related to them, does not disqualify a juror from service or show any bias. See *Commonwealth v. Duran*, 435 Mass. 97, 106-107, 755 N.E.2d 260 (2001) (fact that juror was a correctional officer where the defendant held did not create a presumption of bias). The trial court's finding here was not clearly erroneous, nor was there an abuse of discretion. Even though the contact may have given rise to a high probability of prejudice, the trial judge's appropriate hearing, coupled with her detailed findings, satisfies us that, as the trial judge found, this probability [**22] did not manifest in any actual prejudice.

The indictments. The defendant's final contention, that the grand jury improperly issued indictments charging the defendant with larceny over \$ 250 and fraudulent use of a credit card, is without merit. Our

review of the record suggests that the evidence provided by Sergeant DiDomenica, the Commonwealth's sole witness, was sufficient to identify the defendant as the person involved in each crime, and to justify a reasonable person's conclusion that the defendant used the accounts to buy items and that he intended to do so. The receipts offered reflect that he obtained the goods listed in them. We generally will not review the sufficiency or competency of the evidence before a grand jury. See *Commonwealth v. Lawrence*, 404 Mass. 378, 384, 536 N.E.2d 571 (1989). We have, rarely, departed from the rule where there [**582] was insufficient evidence to establish the identity of the accused or probable cause to arrest him, or where the integrity of the grand jury process was impaired. See *ibid.*; *Commonwealth v. Arias*, 29 Mass. App. Ct. 613, 616, 563 N.E.2d 1379 (1990), S.C., 410 Mass. 1005, 572 N.E.2d 553 (1991). [**23] To invoke these rare exceptions, the defendant bears the burden of showing that the evidence presented (1) was given with knowledge that it was false and deceptive; (2) was given with the intention of obtaining an indictment; and (3) must probably have influenced the grand jury's determination to hand up an indictment. *Commonwealth v. Pond*, 24 Mass. App. Ct. 546, 551, 510 N.E.2d 783 (1987). We conclude that the defendant has failed to show the existence of any of these elements.

Judgments affirmed.

Supreme Judicial Court for the Commonwealth of Massachusetts
One Beacon Street, Third Floor, Boston, Massachusetts 02108
(617) 557-1020

Angela G. Lehman, Esquire
250 Main Street
Charlestown, MA 02129

RE: Docket No. FAR-13790

COMMONWEALTH
vs.
JOHN D. MURPHY

Middlesex Superior Court No. MICR1998-00613
A.C. No. 2001-P-0592

NOTICE OF DENIAL OF F.A.R. APPLICATION

Please take note that on 12/29/03, the above-captioned Application for Further Appellate Review was denied.

Susan Mellen, Clerk

Dated: December 29, 2003

To: James W. Sahakian, A.D.A.
Angela G. Lehman, Esquire

62.

VOLUME: I
PAGES: 110
Exhibits: None

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss.

SUPERIOR COURT DEPARTMENT
OF THE TRIAL COURT
DOCKET NO. 98-613

COMMONWEALTH

v.

JOHN D. MURPHY

TRIAL

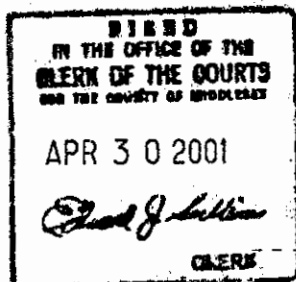
Before: Hamlin, J.
and a jury.

Tuesday, October 10, 2000
Middlesex Superior Court
40 Thorndike Street
East Cambridge, MA 02141

APPEARANCES:

Lincoln Jalelian, Assistant District Attorney
For the Commonwealth

Aviva Jeruchim, Esq.
For the defendant



LISA M. NAPOLITANO, OFFICIAL COURT REPORTER

1 BENCH CONFERENCE AS FOLLOWS:

2 THE COURT: How are you, sir?

3 THE CLERK: Tell the Judge your
4 name.

5 JUROR NUMBER 11-5: Scott Offen.

6 THE COURT: What can I do for you,
7 sir?

8 JUROR NUMBER 11-5: I just wanted
9 to bring to your attention that my father-
10 in-law was a former U.S. Assistant Attorney,
11 and my cousin is a police officer. I don't
12 think that means I can't be impartial, but I
13 thought I would tell you.

14 THE COURT: All right. That was
15 going to be my question to you. Would
16 either of those circumstances interfere with
17 your ability to be fair and impartial?

18 JUROR NUMBER 11-5: No, no. I have
19 one other thing to tell you. There is a
20 scheduling issue for religious regions. I
21 just need to get home by five o'clock on
22 Fridays. Do you think that would be
23 possible?

24 THE COURT: We would be stopping.

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1 How long does it take you to get home?

2 JUROR NUMBER 11-5: About a half
3 and hour.

4 THE COURT: That should be fine
5 because we typically stop at four.

6 JUROR NUMBER 11-5: Oh, that's
7 great. Okay.

8 THE COURT: Not excused.

9 THE CLERK: Not excused.

10

11 END OF BENCH CONFERENCE

12

13 THE CLERK: 11-3, David Parrott.

14 JUROR NUMBER 11-3: Here.

15 THE CLERK: Please take seat number
16 10.

17 And Scott Offen, 11-5.

18 JUROR NUMBER 11-5: Here.

19 THE CLERK: Seat number 11.

20

21 BENCH CONFERENCE AS FOLLOWS:

22 THE COURT: I'm going to ask
23 counsel to just go back and just challenge
24 anyone they don't want in this group. Take

62.

VOLUME: V
PAGES: 159
EXHIBITS: See index

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss.

SUPERIOR COURT DEPARTMENT
OF THE TRIAL COURT
DOCKET NO. 98-613

COMMONWEALTH

v.

JOHN D. MURPHY

TRIAL

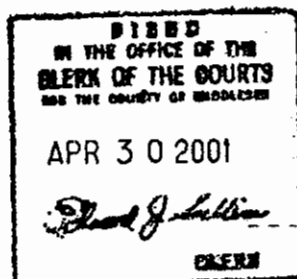
Before: Hamlin, J.
and a jury

Monday, October 16, 2000
Middlesex Superior Court
40 Thorndike Street
East Cambridge, MA 02141

APPEARANCES:

Lincoln Jalelian, Assistant District Attorney
For the Commonwealth

Aviva Jeruchim, Esq.
For the defendant



LISA M. NAPOLITANO, OFFICIAL COURT REPORTER

P R O C E E D I N G S

Monday, October 16, 2000

(10:20 a.m.)

(Without jury.)

THE COURT: Counsel, there are a couple of issues. Juror Number 1 has telephoned and informed the court officers that she fell over the weekend and broke her shoulder, and she is presently in the hospital. She has fractured her shoulder. She isn't in the hospital, but she is going to a bone specialist today, and is not sure when she will be available. So that is issue number one. And obviously, we can get a report. But I don't know whether she will be available or not. We will have to check into it and see.

Juror Number 11 has indicated that he wishes to speak to the Court about something. So, if you could bring him in, and I will ask him what it is he wishes to say to the Court.

And then after we hear what he has to say, I'll see counsel at the side bar and

1 see if there are any follow-up questions.

2

3 (Juror Number 11 enters the courtroom.)

4 THE COURT: Good morning, sir.

5 JUROR NUMBER 11: Good morning.

6 THE COURT: Obviously, we know who
7 you are. But could you just state your name
8 for the record.

9 JUROR NUMBER 11: Sure. Scott
10 Offen, O-f-f-e-n.

11 THE COURT: And you are presently a
12 juror in this case?

13 JUROR NUMBER 11: Yes, I am, Juror
14 Number 11.

15 THE COURT: You indicated that you
16 wanted to see the Court about something.
17 Can you just let me know what that is?

18 JUROR NUMBER 11: Sure. I am very
19 sorry this happened, Your Honor, really. I
20 took your charge very seriously. But I was
21 at a social occasion, and somebody let out
22 that they knew that the defendant had
23 another criminal proceeding before the
24 Court.

1 THE COURT: Can you tell me to the
2 best of your memory, exactly what was said?

3 JUROR NUMBER 11: You know what, I
4 can give you a blow-by-blow description, if
5 you'd like to have it.

6 THE COURT: Yes, I would.

7 JUROR NUMBER 11: So, this person
8 said, "Hi, How are you?" I said, "I'm
9 Okay." And he said -- I work in the stock
10 market. He said, "How have you been this
11 week with the stock market the way it is?"
12 I said, "Well, thank God that I'm on a jury.
13 I haven't had to hear anything. I haven't
14 had to deal with what's going on." And he
15 said, "What kind of a case are you on?" And
16 I said, "Well, it is a criminal case." And
17 he said, "Who is the Judge?" And I said,--
18 "Judge" -- I don't even remember your name
19 anymore.

20 THE COURT: Hamlin.

21 JUROR NUMBER 11: "Judge Hamlin."

22 THE COURT: All right. But did you
23 remember it at the time?

24 JUROR NUMBER 11: Yes. I did

1 remember your name at the time. I'm sorry,
2 Your Honor.

3 THE COURT: No, that's all right.

4 JUROR NUMBER 11: I said, "Judge
5 Hamlin." And he said, "Oh, that's the John
6 Murphy case. He's got another one too."

7 THE COURT: "He's got another one
8 too"?

9 JUROR NUMBER 11: Right. So, I
10 don't know what that really means. But I
11 assumed it meant that he had another -- I
12 think it was reasonable to infer that he
13 meant another -- I happen to know a lot of
14 law enforcement people, unfortunately, and I
15 think it was just reasonable to assume that
16 he meant another -- maybe he said, "He's got
17 another case too." I'm trying to remember
18 the exact words.

19 THE COURT: All right. What did
20 you think it meant?

21 JUROR NUMBER 11: Well, I thought
22 it meant that he had another case, another
23 court case too.

24 THE COURT: Other than what you've

1 related, was there any further conversation?

2 JUROR NUMBER 11: No, there was no
3 further conversation.

4 THE COURT: And have you mentioned
5 or have you said anything at all about this
6 to any of the other jurors?

7 JUROR NUMBER 11: Absolutely not.

8 THE COURT: Let me see counsel over
9 here at the side
10 bar.

11 BENCH CONFERENCE AS FOLLOWS:

12 THE COURT: I'm obviously going to,
13 at some point, ask him, will that interfere
14 with his ability to be fair and impartial?
15 But are there other questions that counsel
16 would want the Court to ask him about the
17 situation?

18 MS. JERUCHIM: No, there are not.

19 MR. JALELIAN: No.

20 THE COURT: So, what I'll do is ask
21 him whether he could be a fair and impartial
22 juror, and then I'll excuse him and we will
23 see where everybody's thoughts are.

24 END OF BENCH CONFERENCE

1 THE COURT: Let me ask you, sir,
2 based upon having had that conversation, do
3 you feel that you could be a fair and
4 impartial juror and decide this case based
5 only on the evidence in this case
6 irrespective of anything beyond this case?

7 JUROR NUMBER 11: Absolutely. I
8 think it is completely irrelevant to this
9 matter at hand. And in this country, you're
10 innocent until proven guilty. And it is
11 completely irrelevant as far as I'm
12 concerned.

13 And I only mentioned it because I
14 thought the defendant was entitled to have,
15 you know, the best, fairest hearing
16 possible, which is why I wanted to bring it
17 up to everybody's attention. It has no
18 impact on me whatsoever.

19 THE COURT: Thank you, sir. So,
20 why don't I excuse you. And obviously don't
21 mention anything. Don't say a word about
22 this to any of the other jurors.

23 JUROR NUMBER 11: I promise.
24 (Whereupon, Juror Number 11 leaves courtroom.)

1 THE COURT: All right. Now, did
2 counsel want me to take a recess so that you
3 can think about what you want to say to the
4 Court on the issue?

5 MR. JALELIAN: No. Thank you,
6 unless the Court wants to.

7 THE COURT: Do you want to have
8 time to talk to your client, counsel?

9 MS. JERUCHIM: I would like that,
10 Your Honor.

11 THE COURT: And in the meantime,
12 obviously we now have thirteen jurors.

13 THE CLERK: We have twelve now.

14 THE COURT: But I mean if I don't
15 excuse -- I haven't yet excused the lady
16 with the shoulder because I'm not sure. She
17 is a nurse and before I would excuse her
18 formally based on the situation here, I
19 think I'd want to try to find out if it was
20 at all possible for her to come.

21 We will take a recess.

22 (10:30 a.m.) (Recess.)

23

24

*

1 (10:40 a.m.)

2 (Without jury.)

3 THE COURT: All right. I asked our
4 clerk to call Juror Number 1 to ascertain
5 her status. She is a licensed practical
6 nurse so presumably has more information
7 then the average person about the situation.

8 She reports that she is in pain and
9 is unable even to dress herself. She cannot
10 drive, and she has to see a bone specialist
11 today at three o'clock and feels that she
12 would not be able to come even if we
13 recessed the trial of this case for a day or
14 two because of the pain that she is in and
15 because of her circumstances, she doesn't
16 feel that she would be able to dress or sit
17 and would undoubtedly be on some pain
18 medication.

19 Do either counsel object if the
20 Court excuses her from service in the case?

21 MS. JERUCHIM: No.

22 MR. JALELIAN: No, Your Honor.

23 THE COURT: All right. And I don't
24 think I have any choice based on her medical

1 situation.

2 All right. What does the defendant
3 say about the issue of Juror Number 11?

4 MS. JERUCHIM: Your Honor, we're
5 satisfied that he is impartial. I would
6 just ask the Court perhaps to give some kind
7 of an instruction to the jury. I would
8 imagine that, you know, whatever the scope
9 of the conversation that is --

10 THE COURT: They don't know
11 anything about it.

12 MS. JERUCHIM: Right.

13 THE COURT: None of the other
14 jurors have heard a word about it. If that
15 were the case, I'd have to talk to each one
16 of them individually. But he has not
17 mentioned it to any of the other jurors.
18 And I believe him when he says he has not.

19 MS. JERUCHIM: I agree, Your Honor.
20 Actually, what I was saying was that I would
21 just ask an instruction to him, himself,
22 that he not consider that conversation as
23 evidence and of course can not have any
24 discussion about it with the jury, and that

1 it is not to have any effect on your
2 deliberations or on the verdict.

3 THE COURT: All right. If you
4 would stand up, Mr. Murphy. You've heard
5 what your lawyer just said concerning the
6 issue of Juror Number 11?

7 THE DEFENDANT: Yes, Your Honor.

8 THE COURT: Is it your wish that we
9 continue and have this juror remain on the
10 jury?

11 THE DEFENDANT: Yes, Your Honor.

12 THE COURT: And you've talked about
13 it with your counsel?

14 THE DEFENDANT: Yes.

15 THE COURT: All right. Thank you.
16 You may sit down.

17 What does the Commonwealth say?

18 MR. JALELIAN: That's fine, Your
19 Honor, to keep this juror. I don't think
20 there is a necessity to do any further
21 instruction or communication with him. He
22 was very clear that he hasn't told anybody,
23 he won't tell anybody, and it won't affect
24 him.

13

1 THE COURT: All right. But out of
2 an excess of caution, I'm going to have him
3 come back.

4 Stand up again, Mr. Murphy, for a
5 minute. You understand that you have no
6 right to have any appellate issue about this
7 juror. This is your chance to address the
8 Court on this issue whether you want him to
9 stay or go. Do you understand that?

10 THE DEFENDANT: Yes, Your Honor.

11 THE COURT: And you want him to
12 stay?

13 THE DEFENDANT: Please.

14 THE COURT: All right. You may sit
15 down.

16
17 (Juror Number 11 enters courtroom.)

18 THE COURT: Good morning, again, if
19 you would sit down.

20 JUROR NUMBER 11: Good morning.

21 THE COURT: Sir, the Court found,
22 based upon what you said, that you can be a
23 fair and impartial juror. So, I'm going to
24 have you continue on the case.

1 I just wanted to say to you that
2 obviously if at any time you felt that what
3 you heard was of concern as to whether you
4 could be fair and impartial, you'd have to
5 let the court officer know and come back and
6 see me again.

7 JUROR NUMBER 11: Okay.
8 Absolutely, Your Honor.

9 THE COURT: But it is your state of
10 mind now that you can be a fair and
11 impartial juror and put out of your mind
12 that conversation and decide this case based
13 solely on the evidence in this case?

14 JUROR NUMBER 11: Absolutely, Your
15 Honor.

16 THE COURT: All right. Thank you,
17 sir. You may step down. And again, don't
18 discuss it with any of the other jurors.

19 JUROR NUMBER 11: I promise.

20 THE COURT: All right. I'm going
21 to find the juror remains fair and impartial
22 and can continue in this case. And I'm
23 going to find that the defendant wishes him
24 to continue after due consultation with

1 counsel and understands he has no appellate
2 rights in this issue should there be a
3 verdict against him in this case.

4 All right. Let me ask the
5 Commonwealth, is the handwriting expert
6 prepared to testify, referring specifically
7 to the exhibits?

8 MR. JALELIAN: Yes.

9 THE COURT: All right. Anything
10 more that counsel want to say before we
11 continue with the trial. Do you want to be
12 heard, counsel?

13 MS. JERUCHIM: Yes, Your Honor. I
14 have a specific issue that I need to address
15 before the trial. I'd just ask at this time
16 that the expert be --

17 THE COURT: Yes. The witnesses are
18 sequestered. So, she will have to wait
19 outside.

20 MS. JERUCHIM: Thank you. With
21 regards to my previous objections regarding
22 the witness' testimony, I am at this time
23 moving to exclude and strike the use of
24 ninety percent of these standards of

62.

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COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss.

SUPERIOR COURT DEPARTMENT
OF THE TRIAL COURT
DOCKET NO. 98-613

COMMONWEALTH

v.

JOHN D. MURPHY

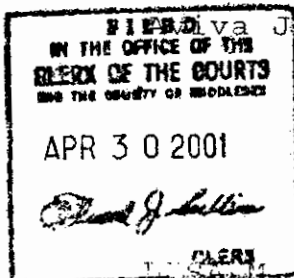
TRIAL

Before: Hamlin, J.
and a jury.

Tuesday, October 17, 2000
Middlesex Superior Court
40 Thorndike Street
East Cambridge, MA 02141

APPEARANCES:

Lincoln Jalelian, Assistant District Attorney
For the Commonwealth



Jeruchim, Esq.
For the defendant

NAPOLITANO, OFFICIAL COURT REPORTER

1 else here who I thought was another clerk,
2 and I asked him, I said, "I need to speak
3 to --"

4 THE COURT: All right. But you can
5 ask Steve.

6 MS. JERUCHIM: I didn't know. I'm
7 sorry. I was attempting to do that.

8 THE COURT: All right. What is it?

9 MS. JERUCHIM: I have a huge issue
10 that just came to my attention during the
11 break. I went out to speak with my client,
12 and we were out in 6B. And it is a matter
13 that has to do with the issue of the juror
14 yesterday, and I don't know if you want me
15 to discuss it.

16 THE COURT: Are you saying,
17 counsel, that you let them bring the jury
18 out, and you have an issue with a juror?

19 MS. JERUCHIM: That's why I'm
20 trying to ask the Court --

21 THE COURT: All right. What do you
22 want to ask me about the juror?

23 MS. JERUCHIM: I spoke with Mr.
24 Jalelian about it. My client obtained

1 additional information that he just brought
2 to my attention about that exchange that was
3 discussed which exceeded this --

4 THE COURT: All right. How did he
5 obtain that information? He is in custody.

6 MS. JERUCHIM: The individual in
7 question with whom the juror had the
8 conversation is my client's Suffolk defense
9 attorney. And last night, my client
10 contacted his Suffolk defense attorney to
11 discuss the case --

12 THE COURT: What is the name of the
13 Suffolk defense attorney?

14 MS. JERUCHIM: I believe his name
15 is John Fox.

16 MR. JALELIAN: Robert Fox.

17 MS. JERUCHIM: Robert Fox. Thank
18 you. And he contacted Mr. Fox approximately
19 at seven o'clock last night, and he had a
20 conversation with him generally about his
21 case and then confronted him on the issue of
22 whether or not he was the one who had the
23 discussion. Mr. Fox admitted that he was.

24 And when he had the discussion with

75

1 him, my client asked him, "What conversation
2 transpired?" And Mr. Fox told my client
3 that he did tell the juror that he was a
4 criminal defense attorney representing Mr.
5 Murphy is Suffolk matters on another
6 criminal case.

7 THE COURT: All right. Well, what
8 we're going to do, counsel, is you can put
9 on your case. And I will deal with this
10 matter after you have put on your evidence.

11
12 END OF BENCH CONFERENCE

13
14 THE COURT: All right. You may
15 proceed, counsel.

16 MS. JERUCHIM: May I call my first
17 witness, please?

18 THE COURT: Yes.

19 MS. JERUCHIM: Joan Culliton.

20
21 JOAN E. CULLITON, SWORN

22 DIRECT EXAMINATION BY MS. JERUCHIM:

23 Q Good morning.

24 A Good morning.

1 complete. I'm going to excuse you briefly
2 and ask that you remain until the Court
3 excuses you.
4

5 (12:15 p.m.) (Jury out.)

6 THE COURT: All right. Counsel,
7 before you called your witness, you asked to
8 approach the bench on an issue concerning a
9 juror.

10 What I want to ask you is when did
11 you find out from your client? I am
12 concerned that it is now 12:15, and I've
13 just been informed of this. When did you
14 find out from your client about this
15 purported conversation with Mr. Fox, his
16 attorney in Suffolk?

17 MS. JERUCHIM: Your Honor, as I
18 indicated to you, when we went over -- when
19 I went over just in the morning recess
20 before I -- before we reconvened. And
21 again, I'll specifically tell you what I
22 did.

23 My client was brought into lock-up.
24 I went in and spoke to him. And this

1 morning when we were speaking, I was
2 discussing the case law that I had pulled
3 and all the issues that went on this morning
4 and in the heat of it, I never brought up
5 the issue of the juror and had no reason to.
6 And when we went back there, we began to
7 just discuss matters generally. And he
8 said, "By the way, I found out who the
9 person was who made this conversation," and
10 told me essentially what I told you at side
11 bar.

12 THE COURT: And you're going to
13 have to repeat in, counsel.

14 MS. JERUCHIM: All right. He
15 confronted -- last night at seven o'clock,
16 he called his attorney, Robert Fox, who
17 represents him on Suffolk indentments on
18 matters in general.

19 And in part of the conversation, my
20 client confronted Mr. Fox and asked him if
21 was the one who had the conversation with
22 the juror, and Mr. Fox responded in the
23 affirmative.

24 THE COURT: What in the world would

1 make him think that it was lawyer that had
2 the conversation?

3 MS. JERUCHIM: Because he couldn't
4 think of anybody -- I'm sorry, Your Honor,
5 let me be precise because there is
6 information that I left out, and I'm sorry.

7 THE COURT: All right. I want you
8 to be absolutely precise about this issue so
9 that I can determine how to handle it.

10 MS. JERUCHIM: Okay. My client
11 called Mr. Fox, as part of attorney/client
12 conversations. And within the context of
13 the client conversation, Mr. Fox said to my
14 client, "Was that juror on your trial
15 excused?" And that was what alerted my
16 client to the fact that Mr. Fox must have
17 been the one who engaged in the
18 conversation. I'm sorry, Your Honor, I
19 omitted that part. I had forgotten.

20 THE COURT: And as I don't know Mr.
21 Fox, may I assume that he is an attorney and
22 an officer of the court?

23 MS. JERUCHIM: I believe that he
24 is, Your Honor. And he represents my client

1 in Suffolk Superior Court on criminal
2 matters, actually almost identical
3 indictments. And my client asked Mr. Fox
4 what they discussed, and Mr. Fox said that
5 he asked the juror if in fact he was on Mr.
6 Murphy's case. That part of the
7 conversation was accurate.

8 But then Mr. Fox went on to state
9 that he was my client's criminal defense
10 attorney representing him in Suffolk
11 Superior criminal matters.

12 THE COURT: So, you're telling me
13 that a lawyer, an officer of the court,
14 knowing that an individual is a deliberating
15 juror, informed him of other pending
16 criminal charges against this defendant?

17 MS. JERUCHIM: Yes.

18 THE COURT: That's what you're
19 saying that this defendant says that his
20 lawyer told him?

21 MS. JERUCHIM: That's correct, Your
22 Honor. And when my client gave me this
23 information, I came out and immediately saw
24 Mr. Jalelian and told him that this issue

1 had arisen. And after that, I came in and
2 looked for Mr. McDade to inform him that I
3 needed to address you before the jury came
4 in.

5 THE COURT: All right. Well,
6 that's a side issue now, counsel. We've
7 taken care of that.

8 MS. JERUCHIM: I'm just letting you
9 know.

10 THE COURT: But you can speak to
11 any court officer or anybody and say, "I
12 need to see the Court before the jurors are
13 brought in." Obviously the court officer is
14 the person most likely to talk to since he
15 is the one I would be telling to bring in
16 the jury.

17 All right. What are you asking me
18 to do, counsel?

19 MS. JERUCHIM: I feel at this
20 point, that I have no choice unfortunately
21 but to move for a mistrial since I cannot --

22 THE COURT: How do you say the
23 situation has changed other than what the
24 juror said?

1 MS. JERUCHIM: Well, what the juror
2 said was basically that he had a
3 conversation with an individual who remained
4 unnamed and said that he was -- that
5 individual said that my client has other
6 matters pending in another court, another
7 matter pending in another court. It wasn't
8 specifically identified as a criminal
9 matter, which I believe now changes the
10 situation completely.

11 And as much as I would like to
12 believe that this juror would remain
13 impartial, I can't now advise my client in
14 the same way that I did yesterday morning
15 when that information came to light. Had I
16 known about that additional information,
17 then I would have advised my client ~~that~~
18 differently. And then my client also tells
19 me that now that he knows that information,
20 he doesn't feel -- he can no longer believe
21 that this jury, regardless of whatever this
22 juror might say, would remain impartial.

23 THE COURT: What additional
24 information do you say changes the

1 situation?

2 MS. JERUCHIM: That this individual
3 was apprised of the fact that my client had
4 essentially criminal matters pending,
5 similar criminal matters pending in another
6 court.

7 THE COURT: All right. Well I'll
8 just say for the record, counsel, that based
9 on what that juror said yesterday, he had
10 drawn that conclusion. And it was clear to
11 the Court he had drawn that conclusion based
12 upon what was said. And in spite of that,
13 he indicated he could remain impartial.

14 MS. JERUCHIM: I understand, Your
15 Honor. But you asked that juror the full
16 text of the conversation, and that juror
17 failed to include that the person with whom
18 the juror was having the conversation with
19 is my client's criminal attorney, and he
20 identified himself as such, which actually
21 if you consider a conversation between two
22 people, it would be logical in the context
23 of how the person making a claim that my
24 client has other matters, how they would

1 know that.

2 So it seems logical, at least from
3 my perspective -- and of course, Your Honor,
4 I wasn't there as part of this conversation
5 between my client and his Suffolk attorney.
6 But it seems that in the context of that
7 type of communication, the statement that,
8 "Yes, I am representing him. I am his
9 criminal attorney representing him on
10 criminal matters," might seem to make sense
11 in light of the conversation.

12 And frankly, Your Honor, when that
13 juror was telling this narrative, it seemed
14 a little bit incomplete but because he came
15 to you and narrated the full course of the
16 conversation, I didn't feel that I had a
17 place to inquire as to the credibility of
18 the context of that conversation.

19 THE COURT: All right. You had the
20 opportunity to suggest any questions to the
21 Court or to say anything you wished,
22 counsel, concerning that juror.

23 MS. JERUCHIM: Your Honor, I did.
24 But again, I'm put in a difficult position.

1 You asked the juror, what exactly took
2 place, what conversation took place between
3 those two people? He in effect --

4 THE COURT: What he could remember.
5 I asked him what he remembered about what
6 was said.

7 MS. JERUCHIM: Well, what was told
8 to me at least, representing my client,
9 omitted this information.

10 THE COURT: Have you talked to Mr.
11 Fox?

12 MS. JERUCHIM: No. I just found
13 this information out. And the final part of
14 the conversation, I think, was my client
15 suggested to Mr. Fox that his conduct was
16 unprofessional, and Mr. Fox did not respond,
17 he declined to comment. That is the full
18 conversation. And frankly, Your Honor, I
19 feel uncomfortable. I am now being put into
20 the position to question another attorney's
21 conduct, ethical conduct.

22 Clearly, a conversation took place.
23 And it really frankly makes sense that Mr.
24 Fox may have been the one to say that

1 because after all, in our small world, how
2 many people know that Mr. Murphy is on
3 trial.

4 THE COURT: Well, anybody in this
5 courthouse knows. There is plenty of police
6 and other lawyers in this courthouse as
7 well. So, it doesn't focus on him
8 necessarily.

9 So, you're asking for what,
10 counsel?

11 MS. JERUCHIM: I'm moving for a
12 mistrial, reluctantly, I might add, but
13 necessarily so.

14 THE COURT: And your client told
15 you this after the Court had denied the
16 motions for directed finding?

17 MS. JERUCHIM: He denied it at the
18 recess -- yes, he told me that, what I told
19 you, Your Honor.

20 THE COURT: In other words, it was
21 after we recessed, after the Court had
22 denied the motion for directed finding?

23 MS. JERUCHIM: Yes. And he went
24 back, and I discussed this with him.

1 THE COURT: All right. What does
2 the Commonwealth say?

3 MR. JALELIAN: Just briefly, Your
4 Honor, I think you have to look at what has
5 changed from yesterday to today. And again,
6 you're going to evaluate the credibility of
7 a neutral and detached juror and his version
8 of what he said happened. And more
9 importantly that he said it has no effect on
10 him. He was very firm and very specific.
11 And I believe he used the words,
12 "Absolutely, it has no effect on me."
13 Weigh that against an eleventh hour
14 assertion by a defendant, not under oath,
15 who has just had the required findings
16 denied. And I think you can use the factual
17 analysis and weigh the credibility, or you
18 can just jump to the legal analysis, and
19 this juror had indicated clearly, forcibly
20 and repeatedly that that conversation has
21 absolutely no effect on his ability to be a
22 juror.

23 The only thing that has changed is
24 now the defendant has interjected a

1 conversation, that may or may not have
2 happened, into the mix and is engineering
3 this trial frankly because I don't think he
4 happy with the way the case is going. It
5 puts Ms. Jeruchim in a difficult position,
6 but it doesn't put the defendant in a
7 difficult position. And the information is
8 coming from the defendant unsworn and self-
9 serving.

10 MS. JERUCHIM: Your Honor, if I may
11 again, just comment on something.

12 THE COURT: Yes.

13 MS. JERUCHIM: Again, I'd still
14 like to think that even in the context of
15 this trial, that my client still has a
16 presumption of innocence.

17 THE COURT: That has nothing to do
18 with what counsel just said.

19 MS. JERUCHIM: That is absolutely
20 correct. But what I am saying to you is,
21 consider what it was that this juror said
22 and I understand that you said that anybody
23 in this courtroom or in this entire
24 courthouse could know that my client is on

1 trial, that may be true. But how many
2 people know that my client is also on trial
3 in another court. I would say that that
4 breaks down the population who could make
5 that claim, so a very, very small and narrow
6 population.

7 And I would say, who else but his
8 attorney would have privy to that
9 information, really it is not an illogical
10 leap, Your Honor, at all, unfortunately.

11 THE COURT: No. But the source of
12 it is not as of concern to me, counsel -- it
13 is of concern to me. But as far as what I
14 have to do here with this case, I don't see
15 how I've heard anything different from you
16 than the juror related other than a few
17 words here and there. But it's quite
18 obvious he drew the conclusion that there
19 were other criminal matters pending
20 elsewhere.

21 MS. JERUCHIM: Your Honor, he in
22 fact never -- and maybe I am misspeaking
23 what this juror said. If this juror had
24 said that he knew that it was a criminal

1 matter, that he heard that it was a criminal
2 matter or inferred that it was a criminal
3 matter, my advice to my client yesterday
4 would have been different, but he did not
5 say that. He said specifically, "another
6 matter," no other words. Clearly, Your
7 Honor, "another matter," could definitely be
8 a civil matter. And I was willing, given
9 that it was left open, that I was going to
10 allow that juror to believe that it was a
11 civil matter.

12 However, this is not the
13 information that I've gotten, that my client
14 one, is represented by a criminal defense
15 attorney on similar charges, and that
16 information was given to that juror.

17 THE COURT: All right. But that's
18 what your client has said.

19 MS. JERUCHIM: That's right.
20 That's what my client said.

21 THE COURT: You haven't spoken to
22 Mr. Fox.

23 MS. JERUCHIM: Right. And frankly,
24 Your Honor, given the seriousness of this

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1 matter, I'm going to question that whether
2 Mr. Fox is going to even want to admit
3 making these statements.

4 THE COURT: Well, if he is an
5 officer of the court and he comes to
6 testify, if he lies under oath, he will have
7 a problem.

8 I'm going to take the recess. We
9 are going to resume at two o'clock.

10 (12:30 p.m.) (Recess.)

11

12 *

13

14 AFTERNOON SESSION

15 (2:15 p.m.) (Jury in.)

16 THE COURT: Good afternoon, members
17 of the jury. Let me ask the jurors, did you
18 obey all the instructions of the Court?

19 I'll note the jurors obeyed the
20 instructions of the Court.

21 Now counsel and the Court, as I
22 told you, counsel have submitted written
23 request for jury instructions; in other
24 words, written requests about what they want

1 me to say about the law. Some of it is
2 pretty standard, but we are required by the
3 criminal rules to have a charge conference
4 meeting, which takes time. And then counsel
5 would be addressing you in closing argument,
6 and the Court will be charging you on the
7 law. And even in the average case, just to
8 cover the basic law will be some forty
9 minutes or so.

10 And what happens is I found that it
11 isn't fair for you really for you to wait
12 and then we do this, and then it might be
13 four-thirty or five o'clock and you're
14 tired. So, I don't want to do that. You've
15 been listening carefully throughout the
16 course of this trial, including today.

17 So I'm going to ask you to come
18 back tomorrow morning at ten o'clock at
19 which time, we will have the closing
20 arguments and the charge.

21 And I will remind you, as I know
22 you are aware of all the instructions of the
23 Court, don't talk to anyone about the case.
24 Don't let anybody talk to you. If anyone

1 attempts to discuss the case with you, cut
2 them off, don't talk to them about it, and
3 report it to the court officer in the
4 morning.

5 So, have a please evening. And
6 have in mind that tomorrow, it may be that
7 you may wish to stay beyond four to
8 deliberate and again, that will be up to
9 you.

10 (Jury excused.)

11 THE COURT: Before we do anything
12 further, I just want to put on the record
13 that I have been giving the matter as
14 reported to me by counsel of what the
15 defendant says he said with his lawyer a
16 great deal of thought, as I ought, it is my
17 responsibility to make sure that the
18 defendant has a fair trial and that the
19 jurors are fair and impartial.

20 I'm also concerned of the issue of
21 having it reported to me by anyone that a
22 lawyer spoke to a deliberating juror.

23 What I'm concerned about is in
24 reviewing my notes and on speaking to

1 defense counsel, I am not really sure what
2 it is that the defendant is claiming was
3 said to him by his lawyer or what he said to
4 the lawyer.

5 So I would like to have the
6 defendant tell me, not what he spoke about
7 other matters, but only what he and the
8 lawyer said about the juror.

9 So if you want to question him,
10 counsel. I need to know exactly what he
11 says was said because that may or may not
12 have a concern.

13 So, can you swear him in, Bob?

14
15 JOHN D. MURPHY, SWORN

16 THE COURT: Obviously, counsel, I
17 am concerned about the defendant getting a
18 fair trial, and I have to know the facts.
19 So, could you just ask him some questions so
20 that it is clear on the record because he
21 had the conversation.

22 MS. JERUCHIM: Yes, Your Honor.

23 Could you state your name for the
24 record, please?

1 THE DEFENDANT: John Derek Murphy.

2 MS. JERUCHIM: And Mr. Murphy, last
3 night at approximately seven o'clock, where
4 were you?

5 THE DEFENDANT: In the custody of
6 the Middlesex Sheriff's Department on the
7 18th floor.

8 MS. JERUCHIM: And at some point,
9 did you make a phone call?

10 THE DEFENDANT: I made numerous
11 calls to Mr. Fox, an attorney in Suffolk
12 Superior Court.

13 THE COURT: Sir, could you speak up
14 a little. It is hard to hear you.

15 What is the full name of your
16 lawyer?

17 THE DEFENDANT: Robert E. Fox.

18 THE COURT: All right. And do you
19 know what his telephone number is?

20 THE DEFENDANT: Area code 6-1-7
21 5-6-6 1-6-6-6.

22 MS. JERUCHIM: And what is Mr.
23 Fox's office address if you know?

24 THE DEFENDANT: 358 Chestnut Hill

1 Ave., Brighton, Suite Number 205.

2 MS. JERUCHIM: And at some point,
3 did you reach Mr. Fox on the phone?

4 THE DEFENDANT: Yes, I did.

5 MS. JERUCHIM: And at approximately
6 what time did you reach him?

7 THE DEFENDANT: Around seven
8 o'clock. Prior to that, his line was busy,
9 so I knew that he was in the office.

10 MS. JERUCHIM: And did you have a
11 conversation with him?

12 THE DEFENDANT: Yes, I did.

13 MS. JERUCHIM: And at some point,
14 did he say something to you which drew your
15 attention to the issues regarding the juror?

16 THE DEFENDANT: He mentioned that
17 he spoke to a juror in this case, and that
18 that juror was eliminated from my trial.

19 THE COURT: He said what? I didn't
20 hear what you said.

21 THE DEFENDANT: He said that the
22 juror -- he said he ran across a juror that
23 was in this case, and that a juror was
24 eliminated from this case.

1 THE COURT: He said that a juror
2 was eliminated from the case?

3 THE DEFENDANT: Yes. And I
4 informed him that the juror was not
5 eliminated.

6 MS. JERUCHIM: And at that point,
7 did you question him about the conversation
8 with the juror?

9 THE DEFENDANT: I briefly did. But
10 I know the telephones are recorded up there,
11 and an attorney call is not privileged. And
12 I did advise him that I thought it was
13 unprofessional, and I wanted to talk to him
14 at a later time. And he informed me that --
15 basically, he informed the juror that he was
16 my attorney on my criminal matter in Suffolk
17 Superior.

18 THE COURT: When you say,
19 "basically," did he say that?

20 THE DEFENDANT: He informed the
21 juror that I was his client or he was my
22 attorney on Suffolk Superior matters,
23 similar to my charges here.

24 THE COURT: All right. Was

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1 anything else said between you and counsel
2 about the issue of the case or the juror?

3 THE DEFENDANT: Meaning Fox
4 counsel?

5 THE COURT: Yes. About the issue
6 of the juror?

7 THE DEFENDANT: No, no.

8 THE COURT: All right. So, he said
9 to you, "The juror was eliminated in the
10 case"?

11 THE DEFENDANT: Yes. That was his
12 impression that I was going to have the
13 juror eliminated. I guess he was gonna --
14 as the juror did notify the Court, he
15 assumed that I was eliminating the juror.

16 THE COURT: And did you tell him
17 that you didn't want the juror eliminated?

18 THE DEFENDANT: I said, "No, I did
19 not eliminate the juror." At that time, he
20 told me that he informed him that he was my
21 attorney in Suffolk Superior Court.

22 THE COURT: And did he say the name
23 of the juror?

24 THE DEFENDANT: No, he did not.

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1 THE COURT: All right. So, what
2 led you to believe it was the same juror?

3 THE DEFENDANT: From the incident
4 that happened earlier in the day.

5 THE COURT: Meaning what?

6 THE DEFENDANT: Meaning the juror
7 brought it to your attention that he was
8 approached by somebody who knew that I had a
9 pending matter.

10 THE COURT: All right. Anything
11 else you want to ask him, counsel?

12 MS. JERUCHIM: I just want to be
13 clear. When you say he knew the juror was
14 eliminated, are you saying he knew he was
15 eliminated, or did he ask you whether or not
16 the juror was eliminated, or did he say it
17 in the sense of -- did he ask you as a --

18 THE DEFENDANT: No. He didn't ask.
19 He basically said that the juror -- I knew
20 that it happened over the weekend. And he
21 said that that juror was -- he assumed that
22 that juror was going to be eliminated.

23 THE COURT: All right. You may
24 step down, sir.

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1 All right. What I have done is Mr.
2 Fox is being notified to come here tomorrow
3 unless he calls here today. So I'm going to
4 ask counsel if we don't hear from him by the
5 time we finish the jury instructions,
6 hopefully, he will be here tomorrow.

7 Because I have two issues, I have
8 an issue about what the juror has told me
9 and if that is all the juror remembers, then
10 there is no problem. But I need to have a
11 hearing to determine what the circumstances
12 are. So, we cannot do that without Mr.
13 Fox.

14 All right. Now counsel, you had a
15 motion for required finding of not guilty at
16 the close of all the evidence?

17 MS. JERUCHIM: Yes, Your Honor.

18 THE COURT: All right. Do you want
19 to be heard, or do you adopt your prior
20 arguments?

21 MS. JERUCHIM: Well, I'd adopt my
22 prior arguments. The only thing that I
23 would add is as you heard, the Commonwealth
24 failed to produce any evidence as to the

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COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss.

SUPERIOR COURT DEPARTMENT
OF THE TRIAL COURT
DOCKET NO. 98-613

COMMONWEALTH

v.

JOHN D. MURPHY

TRIAL

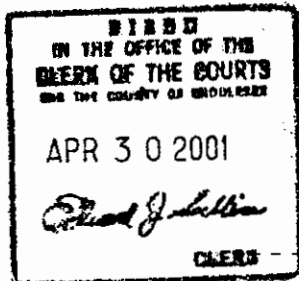
Before: Hamlin, J.
and a jury.

Wednesday, October 18, 2000
Middlesex Superior Court
40 Thorndike Street
East Cambridge, MA 02141

APPEARANCES:

Lincoln Jalelian, Assistant District Attorney
For the Commonwealth

Aviva Jeruchim, Esq.
For the defendant



LISA M. NAPOLITANO, OFFICIAL COURT REPORTER

P R O C E E D I N G S

Wednesday, October 18, 2000

(10:15 a.m.) (Without jury.)

THE CLERK: Good morning, Your Honor. Counsel and the defendant are present, and Attorney Robert E. Fox is also present.

THE COURT: Thank you, Mr. Fox, for coming. Could you come forward, sir. Could you just state your name, please.

MR. FOX: Robert D. Fox.

THE COURT: Sir, I asked you to come because there is an issue involving a juror who is sitting on the case. And your client claims that there was a conversation with a juror. And I just wanted to ask you if you could tell me what, if anything, you know about this.

MR. FOX: Yes. One of my best friends is on the jury. I was in my synagog on Friday night, and I bumped into him. Usually he doesn't go to that synagog, but he was there that night.

THE COURT: And just for the

1 record, so we're sure we're talking about
2 the same person, what is his name?

3 MR. FOX: Scott Offen.

4 THE COURT: All right.

5 MR. FOX: And he mentioned he was
6 on jury duty in this court before you. And
7 I said something like, "You must have the
8 John Murphy case." And he said, "How do you
9 know," I think something to that effect.
10 And I said, "I am representing him," and
11 then I said, "I probably said too much."
12 And I did ask him a general question about
13 what did he think of his experience so far.

14 THE COURT: As a juror?

15 MR. FOX: As a juror, yes. And he
16 talked about the lawyers in the case.

17 THE COURT: All right. So that is
18 the extent of what you said to him. "I am
19 representing him"?

20 MR. FOX: Correct.

21 THE COURT: All right. And is
22 there anything else that you can remember
23 that you might have said about your
24 representation of Mr. Murphy?

1 MR. FOX: No.

2 THE COURT: All right. Can you
3 just sit down for a minute, sir. All right.
4 Is there anything that counsel want to say?

5 MR. JALELIAN: No, thank you, Your
6 Honor.

7 THE COURT: All right. Do you want
8 to say anything, counsel?

9 MS. JERUCHIM: If I could ask the
10 Court to inquire whether Mr. Fox -- and I
11 don't want to infer this, but he just stated
12 that he and Mr. Offen were best friends.

13 And I would just like the Court to
14 ask him directly if as best friends, Mr.
15 Offen has been informed or is aware, in the
16 course of their relationship, that Mr. Fox
17 is a criminal defense attorney?

18 THE COURT: All right. You mean,
19 did he tell him he was a criminal defense
20 attorney?

21 MS. JERUCHIM: No. As part of
22 the -- essentially, does Mr. Offen know or
23 is he aware, because of the nature of their
24 relationship, that Mr. Fox is a criminal

1 defense attorney?

2 THE COURT: Does he know that
3 that's what you do, sir?

4 MR. FOX: He does. We have had
5 many discussions about my work and the
6 judicial system.

7 THE COURT: And the reason I ask
8 you to come is because Mr. Murphy alleged
9 that you and he had a conversation a couple
10 of nights ago at which -- and I don't want
11 to misquote him, but he is claiming that you
12 admitted that you told the juror that you
13 were his attorney on similar criminal
14 matters in Suffolk Superior Court.

15 MR. FOX: I don't think I was that
16 direct.

17 THE COURT: All right. Thank you,
18 sir. Other than that, was there any
19 conversation with the juror; in other words,
20 about the case, about Mr. Murphy?

21 MR. FOX: On the next day,
22 Saturday, I saw him again in the synagog,
23 and he said he thought he should mention it
24 to the Court, our conversation. And I said,

1 "You should." And I think he said he was
2 going to call me that night to talk about
3 what he would say. And I said, "Just tell
4 the truth."

5 He then called me, and it was
6 Tuesday morning after I had the conversation
7 with Mr. Murphy, and he said that he had
8 mentioned to the Court that someone --

9 THE COURT: Because your name did
10 not come up. I didn't ask --

11 MR. FOX: I don't think my name
12 came up.

13 THE COURT: I didn't ask him, and
14 no one asked me to ask him. It didn't
15 appear relevant. But so that's all he said
16 to you?

17 MR. FOX: Yes.

18 THE COURT: All right. Can you
19 just repeat it again. He called you Tuesday
20 morning and said what?

21 MR. FOX: He said he mentioned it
22 to the Court that someone in law enforcement
23 was a friend of his and told him about Mr.
24 Murphy, and I don't remember the exact

1 words. And I had asked him if he had been
2 excused, and he said that he was still on
3 the jury.

4 THE COURT: We had a hearing, the
5 defendant did not want him excused. And the
6 Court found, in any event, that he was fair
7 and impartial.

8 All right. Thank you, sir. If you
9 would just sit down for a minute.

10 All right. Is there anything more
11 that counsel want to say?

12 MR. JALELIAN: No, thank you, Your
13 Honor.

14 THE COURT: Do you want to say
15 anything more, counsel?

16 MS. JERUCHIM: In response to Mr.
17 Fox's comments?

18 THE COURT: Just as to the issue,
19 all that is before the Court concerning the
20 juror and Mr. Fox or anything you want to
21 say concerning the situation?

22 MS. JERUCHIM: Your Honor, I've
23 been instructed by my client again to move
24 for a mistrial.

1 THE COURT: On what basis?

2 MS. JERUCHIM: On the basis that
3 the information that was represented to my
4 client and I from Mr. Offen on the stand was
5 much more vague. And I didn't ask Mr. Offen
6 if he knew the individual because at least
7 from my interpretation of the conversation,
8 it didn't appear that he did. I didn't get
9 the impression that he did because if he
10 knew the person, I felt that he would have
11 told the name. And I don't say this to cast
12 any -- to cloud on Mr. Offen at all. It may
13 be that he did not know what was appropriate
14 or not and just chose to state a minimum of
15 what it was that he needed to state.

16 Nonetheless, my advice to my client
17 and certainly my client's decision not to
18 remove Mr. Offen was based upon his
19 perception that Mr. Offen was not aware that
20 the matters relative to the other court that
21 Mr. Murphy was in was on a criminal case.
22 And clearly that is not the case, Mr. Offen
23 must have known that that was the situation.

24 THE COURT: All right. Well, I

1 have reviewed what Mr. Offen said. And
2 first of all, I'm going to say for the
3 record, that I find Mr. Fox to be credible,
4 and I accept what he has said to me about
5 the conversation.

6 The defendant put much more in it
7 when he spoke yesterday than either,
8 counsel, Mr. Fox or the juror had said. And
9 I don't find that I have anything in front
10 of me which changes the situation. He said
11 very emphatically -- and it appears on the
12 record that I'm going to make a finding, he
13 said very emphatically - and I'm talking
14 about the juror now - that he could be a
15 fair and impartial juror, that people were
16 presumed innocent.

17 So, I find that he remains fair and
18 impartial. I find no need to question him
19 further because I don't find that anything
20 that Mr. Fox has said to me here doesn't
21 jibe with what Mr. Murphy said. It may not
22 be all in the same words, but I don't find
23 that there is an issue. I find that the
24 juror is fair and impartial.

1 And Mr. Fox, thank you for coming.
2 I appreciate it.

3 MS. JERUCHIM: Your Honor, please
4 note my objection.

5 THE COURT: I'll note your
6 objection. All right. I've got your
7 request for jury instructions, and I see
8 that you added identification. Is there
9 anything you want to say about the jury
10 instructions other than -- and I know you've
11 asked me to read the full language of each
12 statute, I'm not going to do that. I'm
13 going to read what appears to be relevant.
14 It would totally confuse the jury to read
15 them a long explanation in any statute.

16 As I always do, I will take out
17 what appears to be relevant.

18 MS. JERUCHIM: Your Honor, I am
19 asking the Court -- and again, I'm going to
20 put my argument on the record, 267, Section
21 1 is very precise, not any document is
22 deemed to be --

23 THE COURT: All right. Let me just
24 shortcut you, counsel, because you've saved